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Supreme Court of the United States

OCTOBER TERM, 1948

No. 442

HANNAH COHEN, EXECUTRIX OF THE ESTATE OF SOL. COHEN, DECEASED, AND DAVID E. COHEN, INTERVENOR, PETITIONERS,

vs.

BENEFICIAL INDUSTRIAL LOAN CORPORATION, ET AL.

No. 512

BENEFICIAL INDUSTRIAL LOAN CORPORATION, PETITIONER,

vs.

HONORABLE WILLIAM F. SMITH, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONS FOR CERTIORARI FILED { DECEMBER 2, 1948. JANUARY 14, 1949.

CERTIORARI GRANTED FEBRUARY 28, 1949.

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9567

HANNAH COHEN, Executrix of the Estate of Sol Cohen, deceased, Plaintiff; DAVID F. COHEN, Intervener,

against

BENEFICIAL INDUSTRIAL LOAN CORPORATION, Defendant-Appellant,

and

O. W. CASPERSEN, JOHN BUDD SMITH, ROY E. TUCKER, EVERETT T. FELTER, JACKSON R. COLLINS, C. V. SMITH, E. L. KINCAID, ALBERT G. MORHART, RAYMOND D. SHEPARD, ALFRED G. ZIMMERMAN, FRED C. EIBELL, RICHARD K. STEINMAN and PAUL A. SEIBOLD, Individually, Defendants.

Appeal from an Order of the United States District Court for the District of New Jersey

Appendix to Brief for Appellant Beneficial Industrial Loan Corporation—Filed December 18, 1947

[fol. 1] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

DOCKET ENTRIES

1943.

August

9 Complaint filed.

9 Summons issued (15 services to be made).

13 Summons returned served on Beneficial Industrial Loan Corp. by serving S. I. Lindell, Sec. & Treas. Southern Trust Co., Resident agent, on Aug. 11, 1943, filed.

16 Notice of motion and motion of David F. Cohen to intervene as a party plaintiff filed.

16 Affidavit of service of notice of motion filed.

23 Hearing on motion—no opposition—Order signed.

23 Order permitting David F. Cohen to intervene as party plaintiff filed. (Fr.)

25 Summons returned served on O. W. Caspersen, John Budd Smith, Roy E. Tucker, Everett T. Felder, Albert G. Morhart, Alfred G. Zimmerman, Fred C. Eibell and Philip Kapinas, personally, on August 13, 1943; served Paul A. Seibold, personally on August 13, 1943; served C. V. Smith by serving his wife on August 13, 1943; served Raymond V. Sheppard, personally, on August 16, 1943; served Richard K. Steinman, personally on August 19, 1943; returned not served as to E. K. Kincaid and Jackson R. Collins, filed.

September

8 Affidavit of service of order permitting David F. Cohen to intervene, filed.

16 Affidavit and notice of motion to dismiss as to Philip Kapinas, filed. (P. H. W.)

20 Stipulation and order extending time to plead etc. to Sept. 30, 1943, filed.

[fol. 2] 27 Summons issued. (2)

30 Notice of motion for summary judgment in favor of the defendants, Everett T. Felter, C. V. Smith, Albert G. Morhart, Raymond D. Shepard, Alfred G. Zimmerman, Fred C. Eibell, Richard K. Steinman and Paul A. Seibold, filed.

30 Notice of motion for more definite statement of for bill of particulars, filed.

30 Answer of Defendant Beneficial Industrial Loan Corporation filed. (H. F. & E.)

30 Notice of fixing place for trial filed. (Newark)

October

14 Notice of motion for inspection of books and affidavit in support thereof, filed.

14 Affidavit of service filed.

November

1 Notice of motion for summary judgment by certain defendants, filed.

1 Notice of motion for summary judgment by defendant Jackson R. Collins, filed.

1 Notice of motion for more definite statement or for a bill of particulars on behalf of Jackson R. Collins, filed.

3 Call of Calendar—Case marked off for term.

8 Summons returned served on Jackson R. Collings, personally on 10-9-43 and on E. L. Kincaid by serving Mrs. E. L. Kincaid on 11-5-43, filed.

8 Hearing on motion to dismiss action as to defendant Philip Kapinas.

8 Order of discontinuance as against defendant, Philip Kapinas, filed.

[fol. 3] 8 Stipulation consenting to discontinuance as to defendant Philip Kapinas filed.

8 Affidavit of Herman S. Turner filed.

8 Hearing on motion for summary judgments in favor of certain defendants. Decision reserved. Briefs to be filed in 10 days. (Smith)

8 Hearing for more definite statement or for bill of particulars. Motion granted as to #13 and #25.

8 Hearing on motion for inspection of books. Decision reserved. Briefs submitted. (Smith)

December

6 Motion for more definite statement or for bill of particulars by defendant E. L. Kincaid, and stipulation thereon filed.

6 Motion for summary judgment by defendant E. L. Kincaid and stipulation thereon filed.

1944

April

4 Call of Calendar—Case marked off for the Term.

May

19 Opinion filed. (Smith)

June

13 Notice of motion for order permitting inspection of books filed.

19 Hearing on motion for order permitting inspection of books. Motion granted. Order to be signed. (S)

24 Order permitting inspection of books filed. (S)

17 Injunction restraining plaintiff and intervener from disclosing any information obtained from records of defendant Beneficial Industrial Loan Corp., filed.

[fol. 4] Notice of motion to compel observance of order dated 6-22-44 and to extend said order to permit examination of records and acknowledgment of service filed.

October

23 Ordered hearing on motion to compel observance of order dated 6-22-44 and to extend said order to permit examination of records, adjourned to 10-30-44. (Fk)

30 Hearing on motion to compel observance of order dated 6-22-44 and to extend said order to permit examination of records—Decision reserved. (S)

30 Affidavits on motion to compel observance of an order dated 6-22-44 etc. filed.

30 Affidavit of Hyman Besser, filed.

1945

March

27 Opinion, filed (s). (Granting motion permitting the inspection of books and records coextensive with the allegations of the complaint from 1929 to 1944, inc.)

April

16 Order permitting further inspection of books and acknowledgment of service filed. (S)

July

17 Notice fixing Sept. 26, 1945 for trial sent counsel.

August

20 Consent order removing action from trial calendar of 9-26-45 filed. (Fk)

1946

January

24 Notice of motion to suggest death of plaintiff on the record and for substitution of plaintiff, and acknowledgment of service, filed.

[fol. 5] 24 Notice of motion for leave to amend complaint and acknowledgment of service filed.

28 Ordered hearing on motion to suggest death of plaintiff on the record and for substitution of plaintiff adjourned to 2-11-46. (Smith)

28 Ordered hearing on motion to amend complaint adjourned to 2-11-46. (Smith)

February

7 Hearing on motion for suggestion on record of the substitution of party plaintiff, and for permission to amend complaint. No opposition. Orders to be submitted. (Smith)

14 Order substituting plaintiff filed. (Smith)

14 Order granting leave to file amended complaint and extending time to file answers filed. (Smith)

27 Amended complaint and acknowledgment of service filed Feb. 26, 1946.

April

16 Answer of defendant Beneficial Industrial Loan Corp., filed.

16 Acknowledgment of service of a copy of answer of defendant, Beneficial Industrial Loan Corp., filed.

22 Notice of motion to dismiss, and for a more definite statement and acknowledgment of service filed.

24 Notice fixing 5-23-46 for trial sent counsel filed 4-22-46.

May

6 Ordered motion to dismiss and for a more definite statement dismissed. (Meaney)

[fol. 6] 7 Ordered hearing on motion to dismiss and for a more definite statement, adjourned to May 20, 1946. (Meaney)

20 Ordered hearing on motion to dismiss and for a more definite statement, adjourned to 6-3-46. (Meaney)

29 Notice of motion for order to take depositions of witnesses and for issuance of subpoenas duces tecum, and acknowledgments of service filed.

June

3 Ordered hearing on motion to dismiss and for a more definite statement adjourned to June 5, 1946. (Meaney)

7 Hearing on motion to strike counts 4, 5, 6, 7 and 9 of the amended complaint and for a more definite statement.

Ordered 4th and 5th counts of the amended complaint, amended. Decision reserved.

7 Hearing on motion for an order to take depositions and for issuance of subpoenas duces tecum. Decision reserved. Memorandums to be submitted. (Meaney)

August

5 Notice of motion to direct plaintiff and intervener to give security to defendant Beneficial Ind. Loan Corp., and acknowledgment of service filed August 2, 1946.

19 Ordered hearing on motion to direct plaintiff and intervener to give security to defendant Beneficial Ind. Loan Corp. adjourned to 9-9-46. (Fake)

[fol. 7] September

9 Stipulation of continuance filed.

9 Ordered hearing on motion to direct plaintiff and intervener to give security to defendant Beneficial Loan Corp., adjourned to September 16, 1946. (Smith)

16 Stipulation of continuance to 9-23-46, filed.

16 Ordered hearing on motion to direct plaintiff and intervener to give security to defendant Beneficial Ind. Loan Corp., adjourned to September 23, 1946. (Smith)

23 Stipulation of continuance to 10-7-46 filed.

23 Ordered hearing on motion to direct plaintiff and intervener to give security to defendant Beneficial Ind. Loan Corp., adjourned to October 7, 1946. (Smith)

October

7 Hearing on motion to direct plaintiff and intervener to give security to defendant Beneficial Loan Corp.—Decision reserved. Briefs to be filed. (Smith)

December

9 Acknowledgment of service of copy of Memorandum filed.

19 Opinion filed 12-18-46. (Meaney) (Granting motion to dismiss 5th, 6th, 7th & 9th causes of action and denying motion to dismiss 4th cause of action.)

1947

February

25 Notice of motion by Beneficial Industrial Loan Corp. to stay proceedings filed February 24, 1947.

25 Consent order staying proceedings and extending time to answer, filed February 24, 1947. (Smith) Notice mailed.

[fol. 8] June

0 Opinion filed June 27. (Smith) (Denying motion to stay proceedings.)

October

9 Trial list (November—Meaney) mailed.

November

3 Notice of motion by Beneficial Industrial Loan Corp. for stay of proceedings and extension of time filed, with acknowledgment of service.

3 Notice of motion for entry of order denying motion for security for costs and acknowledgment of service filed.

3 Hearing on motion by Beneficial Industrial Loan Corp., for stay of proceedings and extension of time. Ordered motion granted. Order to be submitted. (Smith)

3 Hearing on motion for entry of order denying motion for security for costs. Ordered motion granted. Order to be submitted. (Smith)

17 Order denying motion for security for costs, etc., filed. (Smith) Notice mailed.

December

3 Notice of Appeal filed. (E. E. & D.)

3 Copies forwarded to Clerk, USCCA; Charles Hershenstein & Wall, Haight, Carey & Hartpence.

3 Cash in the sum of $250.00 was deposited in Registry in lieu of Bond on Appeal.

3 Stipulation as to contents of transcript of record on appeal filed.

10 Order for correction of docket entry from "June 30, 1947 Opinion, filed June 27 (Smith) (Denying motion to

stay proceedings)" to "June 30, 1947, Opinion, filed June 27 (Smith) Denying motion for security for expenses," filed. (Smith) Notice mailed.

[fol. 9] In United States District Court, District of New Jersey.

Civil Action No. 3033

Hannah Cohen, Executrix of the Estate of Sol Cohen, deceased, *Plaintiff*,

David F. Cohen, Intervener

against

Beneficial Industrial Loan Corporation, *et al., Defendants*

Notice of Motion of Beneficial Industrial Loan Corporation, Dated August 1, 1946, for Security for Reasonable Expenses, Including Counsel Fees, Pursuant to Chapter 131 of the New Jersey Laws of 1945.

To:

Wall, Haight, Carry & Hartpence, Esqs.,
Attorneys for Hannah Cohen, Plaintiff

Charles Hershenstein, Esq.,
Attorney for David F. Cohen, Intervener.

Sirs:

Please take notice that upon the annexed affidavits of Charles E. Rivers, verified the 26th day of July, 1946, Wilkie Bushby, verified the 31st day of July, 1946, and Sigurd A. Emerson, verified the 31st day of July, 1946, and upon the pleadings and all proceedings heretofore had herein, the undersigned will move this Court on the 19th day of August, 1946, at 10:30 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, at the court room of the United States District Court for the District of New Jersey, Post Office Building, Newark, New [fol. 10] Jersey, for an order (1) directing that, within

30 days from the date of service of such order upon plaintiff and intervener with notice of entry thereof, the plaintiff and the intervener give security to defendant Beneficial Industrial Loan Corporation in the amount of not less than $125,000 for the reasonable expenses, including counsel fees, which may be incurred by said defendant in connection with this action, and for the reasonable expenses, including counsel fees, which may be incurred by the other parties defendant in connection therewith for which defendant Beneficial Industrial Loan Corporation may become subject pursuant to law or to its by-laws or under equitable principles, on the ground that the said action has been instituted and maintained by the plaintiff and the intervener in the right of defendant Beneficial Industrial Loan Corporation and that the shares of the stock of defendant Beneficial Industrial Loan Corporation held by the Plaintiff and the intervener have a total stated capital value of less than 5% of the aggregate stated capital value of all the outstanding shares of Beneficial Industrial Loan Corporation's stock and do not have a market value in excess of $50,000; (2) directing that pending the deposit of said security, all proceedings in the above entitled action be stayed; and (3) granting to defendant Beneficial Industrial Loan Corporation such other and further relief as may be just and proper.

Dated, Newark, N. J. August 1, 1946.

Hood, Lafferty & Emerson, By Sigurd A. Emerson. Sigurd A. Emerson, A member of said firm. Attorneys for defendant Beneficial Industrial Loan Corporation, 744 Broad Street, Newark, N. J.

[fol. 11] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF CHARLES E. RIVERS

STATE OF DELAWARE,
COUNTY OF NEW CASTLE, ss.:

CHARLES E. RIVERS, being duly sworn, deposes and says:

1. I am the Secretary of defendant Beneficial Industrial Loan Corporation (hereinafter sometimes called "the Corporation"). This affidavit is submitted in support of the within motion.

2. The relief sought in this motion is necessary in order to protect the Corporation and its more than 16,000 stockholders against heavy loss and damage which would be sustained should it be determined by the Court that the within action has no merit. In that event, in addition to the ex-
[fol. 12] penses and counsel fees incurred by itself, the Corporation will be liable for the expenses and counsel fees of individual defendants under Article X of its By-Laws, which provides in part as follows:

"Indemnification of Directors and Officers

"The Corporation shall indemnify and hold harmless each person who shall serve at any time hereafter as a director or officer of the Corporation from and against any and all claims and liabilities to which such person shall have become subject by reason of his having heretofore or hereafter been a director or officer of the Corporation, or by reason of any action alleged to have been heretofore or hereafter taken or omitted by him as such director or officer, and shall reimburse each such person for all legal and other expenses reasonably incurred by him in connection with any such claim or liability; provided, however, that no such person shall be indemnified against, or be reimbursed for any expense incurred in connection with, any claim or liability arising out of his own negligence or wilful misconduct. The rights accruing to any person under the foregoing provisions of this Article shall not exclude any other right to

which he may be lawfully entitled, nor shall anything herein contained restrict the right of the Corporation to indemnify or reimburse such person in any proper case even though not specifically herein provided for. The Corporation, its directors, officers, employees and agents, shall be fully protected in taking any action or making any payment under this Article X, or in refusing so to do, in reliance upon the advice of counsel."

[fol. 13] Article X of the Corporation's By-Laws was duly adopted at a stockholders' meeting on March 31, 1941, and has in no way been modified or rescinded.

3. The shares of the Corporation's stock held by the plaintiff and the intervener never had a total stated capital value which exceeded 0.01¼% of the aggregate stated capital value of all the Corporation's outstanding shares and never had a market value in excess of $8,062.50. On August 9, 1943, the date of the commencement of this action, there were issued and outstanding 2,000,000 shares of common stock and 144,678 shares of prior preference stock, all without par value. At all times since the commencement of this action there have been a minimum of 2,000,000 shares of common stock, without par value, issued and outstanding. The 250 shares of common stock referred to in paragraph 5 of the amended complaint constitute all the shares of the Corporation's stock ever owned or held by the plaintiff and the intervener.

4. The facts with respect to the expenses and counsel fees to which the Corporation may be subjected in this litigation are presented in the annexed affidavit of Sigurd A. Emerson, a member of the firm of Hood, Lafferty & Emerson, Newark, New Jersey, attorneys for the Corporation in this litigation, and in the annexed affidavit of Wilkie Bushby, a member of the firm of Root, Ballantine, Harlan, Bushby & Palmer, New York City, General Counsel for the Corporation.

5. It is estimated by the above named counsel that the reasonable expenses and counsel fees to which the Corporation may be subjected in connection with this litigation, up to a final determination by the District Court, will be in the minimum amount of $125,000, and it is therefore re-

[fol. 14] spectfully requested that the plaintiff and the intervener be required to give security to defendant Beneficial Industrial Loan Corporation in such amount.

Charles E. Rivers.

Sworn to before me this 26th day of July, 1946. Leonard M. Anderson, Notary Public. My Commission Expires February 7, 1947. (Notarial seal.) (Prothonotary's Certificate attached.)

[fol. 15] In United States District Court

[Title omitted]

Affidavit of Wilkie Bushby

State of New York,
County of New York, ss:

Wilkie Bushby, being duly sworn, deposes and says:

1. I am an attorney at law and a member of the law firm of Root, Ballantine, Harlan, Bushby & Palmer, with offices at 31 Nassau Street, New York, N. Y. My firm has been general counsel for defendant Corporation since its incorporation and has, in association with the firm of Hood, Lafferty & Emerson, of Newark, New Jersey, performed all the legal services on behalf of the Corporation in relation to the within stockholders' derivative action. I am in charge of the services performed by my firm in connection with this action; and I am familiar with all the proceedings had herein and with the various corporate transactions involved.

[fol. 16] 2. This affidavit is submitted in support of the motion made by the defendant Corporation for an order directing the plaintiff and intervener to furnish the Corporation with security in accordance with the provisions of Chapter 131 of the New Jersey Laws of 1945. I have had many years experience with the litigation of large and complicated actions, including stockholders' derivative and other representative actions, and I am familiar with the reasonable value of professional services rendered in such actions.

3. I have read the affidavit of Sigurd A. Emerson, sworn to the 31st day of July, 1946, submitted in support of the

within motion. I know the facts therein set forth to be true and agree with the opinions therein expressed. I also estimate that the minimum amount of the reasonable expenses and counsel fees to which the Corporation will be subjected (that is, the reasonable expenses including counsel fees of individual defendants in the event it is determined by this Court that the within action has no merit, and also its own reasonable expenses and counsel fees) is $125,000.

Wilkie Bushby.

Sworn to before me this 31st day of July, 1946. Lillian B. Campbell, Notary Public Kings County. Kings Co. Clk's No. —, Reg. No. 255-C-7. Certificate Filed in N. Y. Co. Clk's No. —, Reg. No. 295-C-7. Commission Expires March 30, 1947. (Notary Seal.)

[fol. 17] In United States District Court

[Title omitted]

Affidavit of Sigurd A. Emerson

State of New Jersey,
County of Essex, ss:

Sigurd A. Emerson, being duly sworn, deposes and says:

1. I am an attorney-at-law and a member of the law firm of Hood, Lafferty & Emerson, with offices at 744 Broad Street, Newark, New Jersey, attorneys for the defendant Corporation in this stockholders' derivative action, in association with the firm of Root, Ballantine, Harlan, Bushby & Palmer of New York City, general counsel for the Corporation. I am in charge of the services performed by my firm in connection with this action; and I am familiar with all the proceedings had herein and with the various corporate transactions involved.

[fol. 18] 2. This affidavit is submitted in support of the motion made by the defendant Corporation for an order directing the plaintiff and intervener to furnish the Corporation with security in accordance with the provisions of Chapter 131 of the New Jersey Laws of 1945. The purpose of this affidavit is to present an estimate of the amount of

expenses and counsel fees to which the Corporation will be subjected in the event of a determination by this Court that the within action is without merit and for which amount the Corporation seeks security as protection against the loss which will be occasioned to it and its stockholders in such event. I have had many years experience with the litigation of large and complicated actions including actions against corporate directors for mismanagement and I am familiar with the reasonable value of professional services rendered in such actions.

3. The Court is, of course, familiar with the usual detail which is involved in the investigation, analysis, organization and assimilation of facts, in the research and study of questions of law, in dealing with the different types of preliminary motions and with inspections and discoveries, in the preparation of pleadings and briefs and in the steps incident to the preparation and trial of this type of case. It is, therefore, believed that a consideration of the nature of the transactions involved and the basic factors which determine the amount of legal services, rather than a voluminous mass of detail, will provide the most reliable guide in estimating the expenses and counsel fees which will be involved in the litigation of this case to a final determination.

In addition, the amount of security which courts have required in other stockholders' derivative actions will furnish a basis for determining the amount of security to which the Corporation is entitled in order to be given rea- [fol. 19] sonable protection, and the facts with respect to such other cases will be set forth herein.

4. It becomes plain, from a study of the amended complaint, from the number and nature of the proceedings which have taken place thus far and from the fact that more than three years have elapsed since the filing of the original complaint without issue having yet been joined, that this case must be classified in the upper brackets of complicated and expensive litigations.

5. This litigation relates to the business transactions of a large corporate enterprise having hundreds of subsidiary companies conducting operations in thirty-two different states. The extent of these business operations is indicated by the following facts, of which I have been informed by

the officers of the Corporation and which I believe to be true: For the period of 1937 to 1943, both inclusive, the consolidated net income before Federal taxes amounted to over $58,000,000. The aggregate amount of loans made during that period was in excess of $895,000,000, and capital and surplus amounted to approximately $40,000,000. During that period, there were more than 16,000 stockholders of the defendant Corporation.

6. The amended complaint specifically and directly questions in this litigation consolidations and/or intercorporate transactions among the following corporations: the defendant Beneficial Industrial Loan Corporation, Industrial Bankers of America, Inc., Beneficial Loan Society, Collateral Bankers, Inc., American Loan Company, the former Beneficial Industrial Loan Corporation, Beneficial Management Corporation, Beneficial Operating Bureau and Bankers National Investors Corporation; and the general allegations of the complaint involve hundreds of subsidiary corporations located throughout the United States.

[fol. 20] 7. The voluminous factual background of this litigation is well shown by the fact that the plaintiff sought and obtained an inspection and discovery of the following records of the defendant Corporation from the date of its incorporation in 1929: *All* minute books, *all* stock books, *all* stock transfer books, *all* ledgers, *all* books of account, *all* financial statements, *all* corporate resolutions and *all* cancelled corporate vouchers and stubs.

8. The amended complaint puts into the litigation transactions carried on over long periods of time, some of which go back for over 18 years; it attacks the business and capital structure of the Corporation which has been in effect for over 16 years; and it charges liability on the part of the individual defendants in amounts aggregating in excess of $100,000,000.

9. The plaintiff attacks the entire management of the defendant Corporation over the period from the date of its incorporation in 1929 to date, charging officers and directors with a conspiracy to enrich themselves at the expense of the Corporation.

10. The magnitude and expensive character of this litigation is further shown by the brief summary of the transactions involved which now follows:

A. *Beneficial Thrift Club.* The so-called Beneficial Thrift Club was the name given to an employee-benefit plan which was operated to create incentive, loyalty and responsibility on the part of the employees of the business. The operation of the plan antedated the defendant Corporation, for it was adopted by the predecessor companies which developed the business acquired by the Beneficial Industrial Loan Corporation upon its incorporation in 1929. The entire plan (which has al- [fol. 21] ways been an integral part of the Corporation's business) is charged by the plaintiff to be illegal and the rates of interest paid for the benefit of the employees are alleged to have been exorbitant and excessive. The individual defendants are alleged to be liable for over $4,000,000 by reason of the operation of this plan. (First Cause of Action)

B. *Alleged Illegal Issuance of Stock.* Plaintiff charges that the individual defendants caused the Corporation to issue to them illegally and without the payment of consideration a large number of shares of the stock of the Corporation; and alleges that the individual defendants are liable for "very substantial" amounts for the dividends and profits accruing from such stock. (Second Cause of Action)

C. *Office in Clearwater, Florida.* Plaintiff alleges that over a period of 10 years the individual defendants maintained an office in Florida for their individual convenience and benefit rather than for proper corporate purposes; and alleged that the individual defendants are liable in a "very substantial" amount. (Third Cause of Action)

D. *Salary of Clarence Hodson, II.* Plaintiff alleges that the individual defendants are liable for an amount in excess of $100,000 by reason of the payment of a salary to Clarence Hodson, II, charging that he rendered no services whatsoever to the Company. (Fourth Cause of Action)

E. *Issuance of Stock in Connection with Consolidation.* Plaintiff alleges that the individual defendants

are liable in the sum of $20,773,470 because of the issuance to them of 449,209 shares of stock as a result of the consolidation of three corporations into the defend- [fol. 22] ant Beneficial Industrial Loan Corporation; and in this connection attacks the reorganization agreements of Beneficial Loan Society, Collateral Bankers, Inc. and Industrial Bankers of America, Inc. with the *former* Beneficial Industrial Loan Corporation. (Fifth Cause of Action)

F. *Payments made to Beneficial Management Corporation.* Plaintiff attacks all the business transactions which the Corporation had with Beneficial Management Corporation, alleging that the individual defendants are liable in respect of payments made by the Corporation to Beneficial Management Corporation over the six-year period of time from 1937 to 1943 of sums of money in excess of $26,000,00. (Sixth Cause of Action)

G. *Payments made to Affiliates and Subsidiaries.* Plaintiff alleges that the individual defendants are liable for sums of money in excess of $20,000,000 paid by the Corporation to its affiliates and subsidiaries over the period of time between 1937 and 1943. (Seventh Cause of Action.)

H. *Transactions with Collateral Bankers, Inc. and Beneficial Operating Bureau.* Plaintiff alleges that the individual defendants are liable in the amount of $553,451.44 by reason of exorbitant interest rates paid to Collateral Bankers, Inc. over the period of time from 1929 to 1932 and in the amount of $308,208 by reason of excessive interest paid to Beneficial Operating Bureau over the period of time from the date of incorporation of the Corporation to the year 1931 inclusive. (Eighth Cause of Action)

I. *General Allegations.* Plaintiff alleges generally that the individual defendants, before and since the incorporation of the defendant Corporation, engaged [fol. 23] in a general conspiracy to enrich themselves at the expense of the Corporation and thereby damaged the Corporation in excess of $30,000,000. (Ninth Cause of Action)

11. The amount and expense of the legal services which will be involved in a litigation of this case to a final determination is well shown by the extent of the proceedings which have taken place even before issue has been joined. There follows a brief summary of such proceedings:

A. The original complaint was verified on or about May 29, 1943 and filed shortly thereafter.

B. On or about June 2, 1943 the plaintiff obtained a temporary restraining order restraining certain corporations named as parties in the original complaint from removing their records from the jurisdiction.

C. On or about June 6, 1943 the defendant Beneficial Industrial Loan Corporation made a motion for an order quashing the return of service of summons and dismissing the action.

D. On or about June 10, 1943 one David F. Cohen made a motion to intervene as a party plaintiff.

E. On or about July 6, 1943 motions were made by other defendants named in the original complaint for an order dismissing the action.

F. On or about the 12th day of July, 1943 a motion was made by the plaintiff for an inspection and discovery of substantially all of the books and records of the defendant Beneficial Industrial Loan Corporation.

G. On or abont August 9, 1943 this Court granted the motions of the defendants named in the original [fol. 24] complaint and dismissed the complaint without prejudice.

H. On or about August 9, 1943 a new complaint was verified and filed naming different defendants. This complaint alleged four causes of action.

I. Thereafter the defendant Beneficial Industrial Loan Corporation served an answer to the complaint setting forth relevant facts and praying that "so much of each of the complaints as demands that a receiver or receivers for defendant be appointed pending the final judgment or decree in this case and the satisfaction thereof be dismissed, and as to the balance of the relief sought in said complaints defendant submits its rights to the protection of this Court".

J. On or about the 23rd day of August, 1943 one David F. Cohen made a motion to intervene as a party plaintiff.

K. On or about October 4, 1943 a motion was made on behalf of certain of the individuals named as defendants for summary judgment on the ground that no genuine issue as to any material fact existed.

L. On or about October 4, 1943 a motion was made on behalf of the individual defendants for an order directing the plaintiff to file a more definite statement or a bill of particulars.

M. On or about October 18, 1943 the plaintiff made a motion for an inspection and discovery of substantially all of the books and records of the defendant Beneficial Industrial Loan Corporation.

N. On June 22, 1944 the Court entered an order granting an inspection and discovery of the books and records of the defendant Corporation.

[fol. 25] O. On or about August 17, 1944 on motion of the defendant Beneficial Industrial Loan Corporation this Court entered an order restraining plaintiff and intervener and their respective attorneys and accountants from disclosing to any person, firm or corporation, any information obtained from any of the books or records of the defendant Beneficial Industrial Loan Corporation.

P. On or about the 23rd day of October, 1944 the plaintiff made a motion for an order to extend the order permitting the inspection and discovery of the books and records of the defendant Corporation.

Q. On or about April 6, 1945 this Court entered an order extending the right of the plaintiff to inspect the books and records of the defendant Corporation from 1929 to 1944 inclusive.

R. Pursuant to the above-mentioned orders of this Court of June 22, 1944 and April 6, 1945, plaintiff and intervener conducted an extensive inspection of the defendant Corporation's books and records at its principal office in Wilmington, Delaware.

S. In February, 1946 an amended complaint was served alleging nine instead of four causes of action.

T. Thereafter, on or about April 15, 1946 the defendant Beneficial Industrial Loan Corporation served its answer to the amended complaint setting forth relevant facts for the information of the Court and praying that so much of the amended complaint as demands that a receiver or receivers be appointed pending the final judgment be dismissed and as to the balance of the relief sought in the amended complaint, the defendant Corporation submitted its rights to the protection of this Court.

[fol. 26] U. On or about May 6, 1946 the individual defendants named in the amended complaint made a motion to dismiss the Fourth, Fifth, Sixth, Seventh and Ninth alleged causes of action and for a more definite statement or a bill of particulars. This motion is now pending before the Court for determination.

V. On or about the 5th day of June, 1946 the plaintiff made a motion for an order to take the depositions of certain of the individual defendants and other named persons and for the issuance of *subpoenas duces tecum* ordering the production of a voluminous mass of records, documents in the possession of hundreds of different corporations. This motion is now pending before the Court for determination.

12. Thus it is clear that the Corporation is entitled to obtain security in a very substantial amount in order to obtain protection against the loss which will be suffered by it and its stockholders in the event this Court should find that the charges of the plaintiff and the intervener are unfounded. In such event, the Corporation would be liable for the expenses and counsel fees of individual defendants who are represented by Pitney, Hardin, Ward & Brennan, Newark, New Jersey and John Milton, Esq., of counsel, Jersey City, New Jersey, under Article X of its By-Laws, which is set forth in the affidavit of Charles E. Rivers submitted herewith. In addition thereto, the Corporation will be subject to the loss occasioned by the expenses and counsel fees of my firm and of Messrs. Root, Ballantine, Harlan, Bushby & Palmer.

13. In stockholders' derivative actions far less complicated than the one here involved, courts have ordered that [fol. 27] the stockholders who subjected the corporation to the risk of loss to give substantial amounts of security. In one case the court ordered the plaintiff stockholder to give security in the amount of $50,000. That case involved only a corporate bonus plan and the computation of payments made pursuant to such plan. At the time the court fixed the security of $50,000, six of the alleged causes of action had already been dismissed and only three remained involving alleged improper computation payments (*Mann* v. *Luke*, N. Y. L. J., November 10, 1944, p. 1244, col. 4 (Sup. Ct., N. Y. Co.)). In a very recent case the New York Appellate Division affirmed an order requiring the plaintiff stockholder to post security in the amount of $40,000. Here again the amount of the legal services which would be required in that action are not to be compared with the extent of such services in relation to the within action (*Baker* v. *Macfadden Publications*, 270 App. Div. 440, 59 N. Y. S. (2d) 841 (1st Dept. 1946). In another case, a plaintiff stockholder was required to give security in the amount of $25,000. All that was involved in that case was a charge by the plaintiff stockholders that payments under the corporation's profit sharing plan were improperly computed and the alleged improper accounting methods were expressly set forth in the complaint. There were no questions of fact raised by the pleadings and the case did not even remotely approach the magnitude and complexity of the litigation here involved. (*Shielcraft* v. *Moffett*, 49 N. Y. S. (2d) 64 (Sup. Ct., N. Y. Co., 1944)). In another comparatively simple case, the court also required security in the amount of $25,000. (*Noel Associates* v. *Merrill*, 184 Misc. 646, 53 N. Y. S. (2d) 143 (Sup. Ct., N. Y. Co., 1944)). I have been informed of the facts stated in this paragraph by an attorney associated with me in this action, who has examined the records in the above-mentioned cases, and I verily believe them to be true.

[fol. 28] 14. In my opinion the minimum amount of the reasonable expenses and counsel fees to which the Corporation will be subjected (that is the reasonable expenses including counsel fees of individual defendants in the event it is determined by this Court that the within action has no merit, and also its own reasonable expenses and counsel

fees) is $125,000. My estimate is confirmed and supported by the affidavit of Wilkie Bushby, submitted herewith.

Sigurd A. Emerson.

Sworn to before me this 31st day of July, 1946.
Marguerite Wilson, Notary Public of New Jersey.
My Comm. Exp. Jan 21, 1951. [SEAL.]

[fol. 29] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Civil No. 3033

HANNAH COHEN, Executrix of the Estate of Sol Cohen, deceased, Plaintiff,

DAVID F. COHEN, Intervenor,

against

BENEFICIAL INDUSTRIAL LOAN CORPORATION, et al., Defendants

OPINION

Smith, District Judge

This is a stockholders derivative action brought by the plaintiff on behalf of the corporate defendant and against the individual defendants, the officers and directors of the corporate defendant. The jurisdiction of the court is based solely upon the alleged diversity of citizenship.

The action is before the Court at this time on the motion of the corporate defendant to require the plaintiff "to give security for the reasonable expenses, including counsel fees, which may be incurred by it * * * and by the other parties defendant * * * for which it may become subject pursuant to law, * * * or under equitable principles." The corporate defendant asserts a right to such security under section 15, chapter 3, Title 14 of the Revised Statutes of New Jersey, R. S. 14:3-15, N. J. S. A. 14-3-15, hereinafter designated as the General Corporations Act, the pertinent provisions of which follow: "In any action instituted or maintained in the right of any domestic [fol. 30] or foreign corporation by the holder or holders of shares, or of voting trust certificates representing

shares, of such corporation having a total par value or stated capital value of less than five per centum (5%) of the aggregate par value or stated capital value of all the outstanding shares of such corporation's stock of every class, exclusive of shares held in the corporation's treasury, unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifty thousand dollars ($50,000.00), the corporation in whose right such action is brought shall be entitled, at any stage of the proceeding before final judgment, to require *the complainant or complainants to give security for the reasonable expenses, including counsel fees, which may be incurred by it in connection with such action* and by the other parties defendant in connection therewith for which it may become subject pursuant to law, its certificate of incorporation, its by-laws or under equitable principles, *to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action.* The amount of such security may thereafter, from time to time, be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive." (Emphasis by the Court.)

It is the contention of the corporate defendant that the quoted statute creates a right of substantive character which must be enforced in this court under the doctrine of *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64. We cannot agree with this contention. The statute does not grant to the corporate defendant an absolute right

to counsel fees and expenses upon the successful termination of the action. The statute grants to the corporate [fol. 31] defendant nothing more than a right to require security for the payment of counsel fees and costs, their allowance to await determination by the court upon termination of the action. This right is remedial and not substantive. *Boyd* v. *Bell*, 64 F. Sup. 22, 24; See also *Pusey & Jones Co.* v. *Hanssen*, 261 U. S. 491, 497.

The stockholders derivative suit is a remedy peculiar to equity and, as in other suits in equity, the jurisdiction of the court of chancery to award counsel fees and costs as between party and party, as distinguished from the right of

a party to require security for their payment, is governed by section 131, chapter 29, Title 2 of the Revised Statutes of New Jersey, R. S. 2:29-131, N. J. S. A. 2:29-131, hereinafter designated as the Chancery Act, the pertinent provisions of which are quoted in the footnote.[1] It is well established that the allowance of such fees and costs under this statute is within the sound discretion of the court of chancery, *Lane* v. *Rushmore*, 11 A 2d. 91; *Grunstra* v. *New-Ark Petroleum Corp.*, 162 A 2d 746, and the successful party is not entitled to an allowance of such fees and costs as a matter of right, *Henn* v. *Clifford J. Heath, Inc.*, 141 A. 769. The pertinent provisions of the General Corporations Act are clearly consistent with these established principles and should be so construed.

[fol. 32] The General Corporations Act neither abridged the recognized statutory jurisdiction of the court of chancery nor granted

the corporate defendant a substantive right to counsel fees and expenses inconsistent therewith. The statutory jurisdiction of the court of chancery, derived from the Chancery Act, was impliedly augmented by the General Corporations Act to permit enforcement of the remedy made available thereunder to the corporate defendant. The legislation was clearly remedial and created no right of substantive character. The discretionary power of the court of chancery to allow counsel fees and costs as between party and party is not affected by the General Corporations Act.

The right of the corporate defendant under the said

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[1] "In any cause, matter or proceeding in the court of chancery the chancellor may make such allowances by way of counsel fee to the party obtaining the order or decree as shall seem to him to be reasonable and proper, and shall direct which of the parties shall pay such allowances; or, where such allowances are ordered to be paid out of property or funds, shall specify and direct the property or funds liable therefor.

"The chancellor may provide for the inclusion of such allowances in the taxable costs, or may provide for their collection in such other manner as is agreeable to the practice of the court.

"Such allowances shall be in lieu of any allowance for counsel fees provided for by statute."

Act to require the plaintiff to give security for counsel fees and expenses as a condition precedent to the maintenance of his suit, is obviously a limitation upon the right of the plaintiff to invoke the jurisdiction of the court. This limitation, created only by state statute and enforceable in the state court, may not be enforced in the federal court. *Missouri Pacific Ry. Co.* v. *Larabee*, 234 U. S. 459, 471; *Orlando Candy Co.* v. *New Hampshire Fire Ins. Co.*, 51 F. 2d 392, 393, and other cases hereinafter cited.

This remedy, although available to the corporate defendant in the state courts, may not be enforced in this court. It is well established that new equitable rights of substantive character created by state statute may be enforced by the federal courts, the jurisdictional requirements being present, *Guaranty Trust Co.* v. *York*, 326 U. S. 99, but it is equally well established that the equity jurisdiction of the federal courts to enforce such rights may not be limited or impaired by state statute, *Matthews* v. *Rodgers*, 284 U. S. 521, 529; *Henrietta Mills* v. *Rutherford County*, 281 U. S. 121, 127; *Pusey & Jones Co.* v. *Hanssen*, 261 U. S., 491, 497, [fol. 33] *Mason* v. *United States*, 260 U. S. 545, 557; *Mississippi Mills* v. *Cohn*, 150 U. S. 202, 205; *Dodge* v. *Tulleys*, 144 U. S. 451, 457; *Purcell* v. *Summers*, 145 F. 2d 979, 990; *Black & Yates* v. *Mahogony Assn.*, 129 F. 2d 227, 233. Neither the equity jurisdiction of the federal courts nor the right of the litigant to invoke it may be abridged by state legislation.

The apposite principles determinative of procedural conflicts were succinctly stated by Justice Frankfurter in the case of *Guaranty Trust Co.* v. *York*, supra, at page 105: "This does not mean that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court, or conversely, that a federal court may not afford an equitable remedy not available in a state court. Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery, Payne v. Hook, 7 Wall. 425, 430; Atlas Ins. Co. v. Southern, Inc., 306 U. S. 563, 568; Sprague v. Ticonic Bank, 307 U. S. 161, 164-165; a plain, adequate and complete remedy at law must be wanting, §16, 1 Stat. 73, 82, 28 U. S. C. §384; explicit Congressional curtailment of equity powers must be respected, see, e.g., Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. §101 et seq.; the constitutional right

to trial by jury cannot be evaded, Whitehead v. Shattuck, 136 U. S. 146. That a State may authorize its courts to give equitable relief unhampered by any or all such restrictions cannot remove these fetters from the federal courts. See Clark v. Smith, supra at 203; Broderick's will, 21 Wall. 503, 519-20; Louisville & Nashville R. Co. v. Western Union Co., supra at 376; Henrietta Mills v. Rutherford Co., 281 U. S. 121, 127-128; Atlas Ins. Co. v. Southern, Inc., supra, at 568-70. State law can-

not define the remedies which a federal court must give simply because a federal court in diversity jurisdiction is [fol. 34] available as an alternative tribunal to the State's courts. Contrariwise, a federal court may afford an equitable remedy for a substantive right recognized by a State even though a State court cannot give it. Whatever contradiction or confusion may be produced by a medley of judicial phrases severed from their environment, the body of adjudications concerning equitable relief in diversity cases leaves no doubt that the federal courts enforced State-created substantive rights if the mode of proceeding and remedy were consonant with the traditional body of equitable remedies, practice and procedure, and in so doing they were enforcing rights created by the States and not arising under any inherent or statutory federal law."

There have been cases in which the federal courts have recognized and enforced, as a right substantive in character, the right of the successful plaintiff to recover attorneys fees and costs. *Sioux County* v. *National Surety Co.*, 276 U. S. 238; *Home Life Ins. Co.* v. *Fisher*, 188 U. S. 726; *Iowa Life Ins. Co.* v. *Lewis*, 187 U. S. 335; *Fidelity Mutual Life Assn.* v. *Mettler*, 185 U. S. 308. The cases cited by the corporate defendant in its brief are in this category. *Associated Manufacturers Corp.* v. *De Jong*, 64 F. 2d 64; *Pond* v. *Goldstein*, 41 F. 2d 76; *Business Men's Assur. Co.* v. *Campbell*, 18 F. 2d 223. The cited cases, however, are easily distinguishable from the present case. It will be observed that in each of these cases the liability of the defendant for attorneys fees and costs was a statutory liability assumed by the defendant under contract, and the right of the plaintiff to their recovery was absolute; the allowance of attorneys fees and costs was not within the discretion of the court, but their

award as an element of damage was mandatory. Ibid. These were important differentiating factors and were so regarded by the courts.

[fol. 35] There have been other cases in which the historic equity jurisdiction of the federal courts to allow attorneys fees and costs as between solicitor and client has been sustained as inherent. *Sprague* v. *Ticonic Bank*, 307 U. S. 161; *Central Railroad* v. *Pettus*, 113 U. S. 116; *Trustees* v. *Greenough*, 105 U. S. 527; *Lamar* v. *Hall & Wimberly*, 129 Fed. 79. These cases are likewise easily distinguishable from the present case. It will be observed that in each of the cited cases, as well as in many others not cited, attorneys fees and costs were assessed against the beneficiaries of the litigation pursuant to commonly accepted equitable principles. Ibid.

The present case is governed by the Federal Rules of Civil Procedure promulgated by the Supreme Court pursuant to Sections 723(b) and 723(c) of Title 28 U. S. C., 28 U. S. C. A. 723 (b) and 723 (c). There is nothing therein which permits the allowance of "counsel fees and expenses" as between party and party; in fact, Section 571 of Title 28 U. S. C., 28 U. S. C. A. 571, as construed by the courts, prohibits such allowances in the absence of express statutory authority. *Tullock* v. *Mulvane*, 184 U. S. 497, 511; *Oelrichs* v. *Spain*, 15 Wall. 211, 230; 82 U. S. 211, 230; *McIntosh* v. *Ward*, 159 Fed. 66, 68; *Farmers' Loan & Trust Co.* v. *Green*, 79 Fed. 222, 225; Cf. *Gold Dust Corp.* v. *Hoffenberg*, 87 F. 2d 451, 453; *Marks* v. *Leo Feist, Inc.*, 8 F. 2d 460. It seems reasonably clear that under the Federal Rules of Civil Procedure the recoverable costs are limited to the ordinary taxable costs. It would be

obviously futile to require the plaintiff in the instant case to give security for the payment of "counsel fees and expenses" if, as the cases seem to hold, there is no jurisdiction in the court to allow them upon termination of the suit.

The contention that the General Corporations Act created a right substantive in character, if adopted, will not avail [fol. 36] the corporate defendant. The said defendant is admittedly a corporation of the State of Delaware, and it necessarily follows that the law of Delaware is determinative not only of the liability of its officers and directors but

also of the rights of stockholders. *Prudential Ins. Co. of America* v. *Carlson*, 126 F. 2d 607, 611; *Gallup* v. *Caldwell*, 120 F. 2d 90. The liability of the corporate defendant for counsel fees and expenses may be charged against the plaintiff stockholder, upon the successful defense of the stockholders derivative action, only if such fees and expenses are recoverable as a matter of right under the laws of Delaware.

The constitutionality of the General Corporations Act is challenged by the plaintiff, and this challenge may not be without merit. See *Zlinkoff, The American Investor and the Constitutionality of Section 61-B of the New York General Corporation Law*, 54 Yale L. J. 352; compare *Myer* v. *Myer*, 296 N. Y. 979. We see no reason, however, to consider the constitutional questions raised in the plaintiff's brief.

The motion is denied.

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[fol. 37] In United States District Court, District of New Jersey

Civil Action No. 3033

Hannah Cohen, Executrix of the Estate of Sol Cohen, deceased, Plaintiff,

David F. Cohen, Intervener,

against

Beneficial Industrial Loan Corporation, *et al.*, Defendants.

Order on Motion for Security for Expenses

This matter coming on to be heard before the Court on motion of the defendant Beneficial Industrial Loan Corporation for an order, pursuant to Sections 15 and 17, Chapter 3, Title 14 of the Revised Statutes of New Jersey, directing the plaintiff and the intervener to give security for the reasonable expenses, including counsel fees, which may be incurred by said defendant in connection with this action, and for the reasonable expenses, including counsel fees, which may be incurred by the other parties defendant in connection therewith for which defendant Beneficial Indus-

trial Loan Corporation may become subject, and Hood, Lafferty and Emerson, Esqs., now Emerson, Emery and Danzig, Esqs., by Sigurd A. Emerson, Esq., appearing on [fol. 38] behalf of the said motion, and Wall, Haight, Carey & Hartpence, Esqs., by Edward J. O'Mara, Esq., and Charles Hershenstein, Esq., appearing in opposition to said motion, and the Court having heard and considered the arguments of counsel and having read and considered the memoranda presented by counsel in support of their positions, and being of the opinion that said motion should be denied; and application having been made by Beneficial Industrial Loan Corporation on November 3, 1947, for a stay pending an appeal or other review of the denial of said motion for security for expenses:

Now, it is on this 17th day of November, 1947

Ordered, that the said motion of defendant Beneficial Industrial Loan Corporation, for security for expenses be, and the same hereby is, denied; and it is further

Ordered, that all proceedings in this action shall be, and hereby are, stayed for ninety (90) days from the date hereof pending an appeal or other review of the denial of the motion for security for expenses in the Circuit Court of Appeals for the Third Circuit, provided that a notice of appeal or any other petition for review of this order is filed by the defendant Beneficial Industrial Loan Corporation not later than twenty days after the entry of this order; and it is further

Ordered that in the event the situation of the plaintiff and the intervener changes, they or either of them may apply on five (5) days' notice for a modification of the stay herein ordered.

Dated: November 17, 1947.

William F. Smith, U. S. District Court Judge.

[fol. 39] We hereby consent to the entry of the foregoing order.

Pitney, Hardin, Ward & Brennan, Attorneys for defendants O. W. Caspersen, John Budd Smith, Roy E. Tucker, Everett T. Felter, Jackson R. Collins, C. V. Smith, E. L. Kincaid, Albert G. Morhart, Raymond D. Shepard, Alfred G. Zimmerman, Fred C. Eibell, Richard K. Steinman and Paul A. Siebold. Waldon M. Ward, Of Counsel for the above named defendants.

[fol. 40] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9558

HANNAH COHEN, Executrix of the Estate of Sol Cohen, deceased, Plaintiff; DAVID F. COHEN, Intervener,

against

BENEFICIAL INDUSTRIAL LOAN CORPORATION *et al.*, Defendants.

In the Matter of the Application of Beneficial Industrial Loan Corporation for a writ of Certiorari or for a Writ of Mandamus

MOTION FOR RULE TO SHOW CAUSE

To the Honorable the Judges of the Circuit Court of Appeals of the United States for the Third Circuit:

Now comes Beneficial Industrial Loan Corporation and moves, upon the showing made by the accompanying petition for a writ of certiorari or for a writ of manadmus, that a rule be entered and issued directing the District Court of the United States for the District of New Jersey and the Honorable William F. Smith, a judge thereof, to show cause why a writ of mandamus should not issue against them, in accordance with the prayer of said petition, and why Beneficial Industrial Loan Corporation should not have such other and further relief as may be just.

Dated December 5, 1947.

Charles Danzig, Emerson, Emery & Danzig, Attorneys for Beneficial Industrial Loan Corporation, 744 Broad Street, Newark 2, New Jersey.

[fol. 41] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9558

[Title omitted]

PETITION FOR WRIT OF CERTIORARI OR MANDAMUS

To the Honorable the Judges of the Circuit Court of Appeals of the United States for the Third Circuit:

Your petitioner, Beneficial Industrial Loan Corporation (herein sometimes referred to as "the Corporation"), respectfully shows as follows:

1. On August 9, 1943, there was filed in the United States District Court for the District of New Jersey by Sol Cohen, as the holder of 100 shares of the outstanding 2,000,000 shares of common stock of the Corporation, a derivative stockholder's action in the right of the Corpora- [fol. 42] tion against certain directors of the Corporation and others. Under the rules governing such actions, the Corporation was named and served as a nominal party defendant. On August 23, 1943, David F. Cohen, as holder of 150 shares of the Corporation's common stock, intervened as a party plaintiff.

2. Pursuant to orders of the District Court dated June 22, 1944, and April 6, 1945, the plaintiff and intervener, through their accountants, conducted an extensive inspection of the Corporation's books and records.

3. On February 14, 1946, Hannah Cohen, executrix of the estate of Sol Cohen, deceased, was substituted as plaintiff in the place of Sol Cohen, deceased. On February 16, 1946, an amended complaint was filed, alleging nine causes of action against certain directors of the Corporation and others. The amended complaint attacked the management of the Corporation for alleged misconduct and waste of the corporate assets over a period of more than sixteen years, and alleged that the individual defendants were liable for amounts in excess of $100,000,000.

4. The Corporation served answers to both the original and the amended complaint, setting forth relevant facts and, as a mere formal party, submitting its rights to the

protection of the Court. The individual defendants have not yet filed an answer, their time to do so being still open.

5. On motion of the individual defendants dated April 16, 1946, the District Court dismissed four of the causes of action alleged in the amended complaint on the ground that they failed to state a claim on which relief can be granted. The causes of action so dismissed related to transactions in an amount of over $96,000,000. The decision of the District Court is reported in 69 F. Supp. 297.

[fol. 43] 6. On August 1, 1946, your petitioner made a motion for an order requiring the plaintiff and intervener to give security to petitioner in the amount of $125,000 for the reasonable expenses, including counsel fees, which may be incurred by petitioner in connection with the action, and for the reasonable expenses, including counsel fees, which may be incurred by the other parties defendant in connection therewith, for which the petitioner will be liable in the event it is held that the action against the individual defendants is without merit. True copies of your petitioner's notice of motion and the three affidavits submitted in support thereof are annexed hereto, marked "Exhibit A," "Exhibit B," "Exhibit C" and "Exhibit D," respectively.

7. The said motion is based on Chapter 131 of the New Jersey Laws of 1945. Sections 1 and 3 of Chapter 131 (N. J. R. S. Cum. Supp. 14:3-15, 14:3-17) provide as follows:

> "In any action instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation having a total par value or stated capital value of less than five per centum (5%) of the aggregate par value or stated capital value of all the outstanding shares of such corporation's stock of every class, exclusive of shares held in the corporation's treasury, unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifty thousand dollars ($50,000.00), the corporation in whose right such action is brought shall be entitled, at any stage of the proceeding before final judgment, to require the complainant or complainants to give security for the

[fol. 44] reasonable expenses, including counsel fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to law, its certificate of incorporation, its by-laws or under equitable principles, to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action. The amount of such security may thereafter, from time to time, be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive.

"This act * * * shall take effect immediately and shall apply to all such actions, suits or proceedings now pending in which no final judgment has been entered, and to all future actions, suits and proceedings."

8. It is not disputed that all requirements of the statute are satisfied. The shares held by the plaintiff and intervener never exceeded 0.01¼% of the ou-standing shares of its capital stock and never exceeded a total market value of $9,000.

9. The motion was argued before Honorable William F. Smith, United States District Judge, on October 7, 1946. Thereafter, on June 27, 1947, District Judge Smith filed an opinion and decision, wherein for reasons stated he denied the motion. A true copy of said opinion and decision is annexed hereto, marked "Exhibit E." In the opinion he held that Chapter 131 of the New Jersey Laws of 1945 is procedural in nature and not binding on the Federal District Court.

[fol. 45] 10. On November 17, 1947, an order was entered on said opinion and decision, denying the motion of your petitioner for security for expenses and counsel fees. A true copy of said order is annexed hereto, marked "Exhibit F."

11. On December 3, 1947, your petitioner filed a notice of appeal to this Court from the order of the District Court. Your petitioner believes that the said order is a final decision within the meaning of section 128 of the Judicial Code

(36 Stat. 1133, 28 U. S. C. §225), as amended, for the reasons set forth in the brief accompanying this petition. A writ of certiorari or mandamus is sought only in the event that it should be determined that no direct appeal to this Court lies from the order of the District Court.

12. Petitioner submits that the New Jersey statute here involved is binding on the Federal District Court sitting in New Jersey and that the District Court erred in denying petitioner's motion. Petitioner further claims that the action of the United States District Court for the District of New Jersey, in denying the motion of your petitioner for an order requiring the plaintiff and intervener to give security pursuant to Chapter 131 of the New Jersey Laws of 1945, and in refusing to fix a reasonable amount for such security, is entirely without warrant of law and is not a matter within the judicial discretion of the District Court.

13. The order sought to be reviewed denies to your petitioner a very substantial right. The statute invoked was enacted in order to protect corporations and their stockholders from the losses which they will otherwise suffer as a result of expenses and counsel fees in connection with the litigation of derivative stockholder's suits in the event it is determined that the causes of action asserted therein [fol. 46] have no merit. The fact that in the instant action four of the alleged causes of action, involving transactions in the amount of more than $96,000,000, have already been dismissed on the merits exemplifies concretely the obvious risk of substantial loss to which a corporation is subjected by the institution of a derivative action in its right. Pursuant to Article X of its by-laws, as adopted at a stockholders' meeting on March 31, 1941, the Corporation will be liable to the individual defendants for the reasonable expenses, including counsel fees, incurred by them in their successful defense against the four alleged causes of action which the Court dismissed on the merits. Unless the Corporation can obtain reimbursement under the New Jersey statute from the plaintiff and intervener who took it upon themselves to assert claims on behalf of the Corporation, found by the Court to be without merit, and thus subject it to this liability, this substantial loss will have to be borne by the Corporation and its stockholders, 99.9% of whom had nothing to do with, but were powerless to prevent, the assertion of these unfounded claims. Unless

they obtain the protection provided for such cases by Chapter 131 of the New Jersey Laws of 1945, their losses will be much more serious if this action is litigated to a final determination, in case the remaining causes of action are also found to be without merit.

14. Unless the order of the District Court is reviewed prior to its final disposition of the action, the Corporation will be denied any review at all. This is so because under the New Jersey statute the posting of the security may be required only "at any stage of the proceedings *before* final judgment," so that thereafter the Corporation's right to reimbursement for expenses and counsel fees would be irretrievably lost and appellate review of the order would be meaningless. Moreover, the Corporation being merely a formal party to the action, would normally have no standing to appeal from the final judgment in the main action.

[fol. 47] 15. Petitioner further submits that the question of federal law decided by the District Court as to the binding effect of the New Jersey statute here involved is a question of large importance warranting prompt and authoritative determination. A very considerable volume of corporate litigation is affected thereby, since both New York and Pennsylvania have identical statutes.

16. Jurisdiction of this Court is invoked under section 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. §377). This Court would have appellate jurisdiction from any final decree in this cause and the jurisdiction of this Court to issue a writ of certiorari or a writ of mandamus in aid of such appellate jurisdiction is hereby invoked.

Wherefore, in the event that this Court determines that the order of United States District Court for the District of New Jersey entered on November 17, 1947, is not appealable, your petitioner respectfully prays:

1. That a writ of mandamus issue out of this Court to the Honorable William F. Smith, Judge of the United States District Court for the District of New Jersey, and to said Court itself; directing that the order entered on November 17, 1947, denying your petitioner's motion for security for expenses, including counsel fees, be vacated and that an order be entered requiring the plaintiff and intervener to give security for the reasonable expenses,

including counsel fees, which may be incurred by your petitioner in this action, and for the reasonable expenses, including counsel fees, which may be incurred by the other parties defendant in connection therewith, for which your petitioner may become subject pursuant to law or to its by-laws or under equitable principles, in such amount as the Court determines to be reasonable; or

2. That a writ of certiorari be issued under the seal of this Court, directed to the United States District Court for [fols. 48-49] the District of New Jersey, sitting in the City of Newark, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record and all proceedings of said Court in this case, to the end that this case may be reviewed and determined by this Court and that the order of the District Court to be reversed; and

3. That the Court grant to your petitioner such other and further relief as may be just and proper.

Dated: December 5, 1947.

Beneficial Industrial Loan Corporation. By Charles Danzig, Charles Danzig, Emerson, Emery & Danzig, Attorneys for Petitioner, 744 Broad Street, Newark, N. J.

Duly sworn to by Charles Danzig, jurat omitted in printing.

Exhibits "A" to "F" inc. to foregoing petition omitted in printing. These exhibits are copies of notice of motion, affidavits, opinion and order appearing at side folios 9 to 39 inc.

[fol. 50] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM 1947

No. 9558

BENEFICIAL INDUSTRIAL LOAN CORPORATION, et al., Petitioners,

v.

HONORABLE WILLIAM F. SMITH, a Judge of the United States District Court for the District of New Jersey, Respondent

RULE TO SHOW CAUSE—Filed December 17, 1948

Present: Biggs, Goodrich and Kalodner, Circuit Judges.

On consideration of the petition of Beneficial Industrial Loan Corporation for a Writ of Mandamus directed to the District Court of the United States for the District of New Jersey and the Honorable William F. Smith, a judge thereof, verified on the 5th day of December, 1947, it is

Ordered that cause be shown by the District Court of the United States for the District of New Jersey and by the Honorable William F. Smith, a judge thereof, before this Court, at the United States Court House, Philadelphia, Pennsylvania, on the 8th day of January, 1948 why a Writ of Mandamus should not be granted, as prayed for in said petition; and it is

Further ordered that leave is granted to Hannah Cohen, Executrix of the Estate of Sol Cohen, deceased and David F. Cohen, parties to the litigation referred to in the petition, to intervene in this proceeding, if they be so advised, and to file an answer to the petition on or before the return day of the rule; and it is

Further ordered that service of a copy of this order and of the petition for a Writ of Mandamus upon the Clerk of the United States District Court for the District of New Jersey at the United States Post Office and Court House, Newark, New Jersey, on or before January 2, 1948 shall be deemed sufficient service.

By the Court, Biggs, United States Circuit Judge.

Dated December 17, 1947.

[fol. 51] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9567

[Title omitted]

ORDER—Filed January 8, 1948

Before McLaughlin and Kalodner, J. J.

Upon the subjoined consents of the attorneys for the parties hereto, it is on this 8th day of January, 1948,

Ordered that the time for filing answer to the petition for a Writ of Mandamus be extended to January 29, 1948 and that the time within which petitioner may file reply brief be extended to February 18, 1948, and

It is further ordered that the time within which the attorneys for the respondents to the appeal of the defendant, Beneficial Industrial Loan Corporation, from a certain order of the United States District Court for the District of New Jersey, must file their brief be extended to the 29th day of January, 1948, and that the time within which appellant may file a reply brief be extended to February 18, 1948.

McLaughlin, Circuit Court Judge.

We consent to the entry of the foregoing order.

Emerson, Emery & Danzig, Attorneys for Appellant and Attorneys for Petitioner for a Writ of Certiorari or a Writ of Mandamus, 744 Broad Street, Newark 2, New Jersey.

Wall, Haight, Carey & Hartpence, Attorneys for Respondent on Appeal and Attorneys Appearing [fols. 52-53] in Behalf of Plaintiff on Rule to Show Cause why a Writ of Certiorari or a Writ of Mandamus Should Not Issue. 1 Exchange Place, Jersey City 2, New Jersey.

Charles Hershenstein, Attorney for Intervener Respondent on Appeal and Attorney Appearing in Behalf of Intervener on Rule to Show Cause why a Writ of Certiorari or a Writ Mandamus should not issue. 26 Journal Square, Jersey City, New Jersey.

[File endorsement omitted.]

[fol. 40] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9558

BENEFICIAL INDUSTRIAL LOAN CORPORATION, Petitioner,

and

HANNAH COHEN, Executrix of the Estate of Sol Cohen, Deceased, and David F. Cohen, Interveners,

v.

HON. WILLIAM F. SMITH, a Judge of the United States District Court for the District of New Jersey, Respondent

No. 9567

HANNAH COHEN, Executrix of the Estate of Sol Cohen, Deceased, Plaintiff; DAVID F. COHEN, Intervener,

v.

BENEFICIAL INDUSTRIAL LOAN CORPORATION, Appellant,

and

O. W. CASPERSEN, JOHN BUDD SMITH, ROY E. TUCKER, T. FELTER, Jackson R. Collins, C. V. Smith, E. L. Kincaid, Albert G. Morhart, Raymond D. Shepard, Alfred G. Zimmerman, Fred C. Eibell, Richard K. Steinman, and Paul A. Seibold, Individually, Defendants

Appeal from the United States District Court for the District of New Jersey

Argued March 15, 1948

Before Biggs, Chief Judge, O'Connell and Kalodner, Circuit Judges

[fol. 41] OPINION OF THE COURT—Filed September 22, 1948

By BIGGS, Chief Judge:

Hannah Cohen, Executrix of the Estate of Sol Cohen, deceased, is the plaintiff in a stockholders' derivative suit at our No. 9567 brought on August 9, 1943 on behalf of the corporate defendant, Beneficial Industrial Loan Corpora-

tion, a Delaware corporation, against the individual defendants, O. W. Casperson and the others named in the title of this appeal, officers and directors of the corporation. David Cohen intervened on the plaintiff's side. Jurisdiction is based on diversity of citizenship. The complaint is an exceedingly extensive one. It charges the individual defendants with corporate mismanagement and fraud. Article X of the By-Laws of the corporation provides that Beneficial will indemnify a director or officer of the corporation against any claim or demand to which he shall have become subject by reason of his having been an officer or director of the corporation, including reasonable expenses and counsel fees.[1]

The plaintiff and intervener have never held more than 0,01¼% of Beneficial's stock. That corporation, pursuant to the provisions of R. S. 14:3-15, N. J. S. A. 14:3-15, an Act [fol. 42] passed by the New Jersey Legislature which took effect on April 10, 1945 (See N. J. R. S. Cum. Supp. 14:3-17,

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[1] Article X in pertinent part is as follows: "The Corporation shall indemnify and hold harmless each person who shall serve at any time hereafter as a director or officer of the Corporation from and against any and all claims and liabilities to which such person shall have become subject by reason of his having heretofore or hereafter been a director or officer of the Corporation, or by reason of any action alleged to have been heretofore or hereafter taken or omitted by him as such director or officer, and shall reimburse each such person for all legal and other expenses reasonably incurred by him in connection with any such claim or liability; provided, however, that no such person shall be indemnified against, or be reimbursed for any expense incurred in connection with, any claim or liability arising out of his own negligence or wilful misconduct. The rights accruing to any person under the foregoing provisions of this Article shall not exclude any other right to which he may be lawfully entitled, nor shall anything herein contained restrict the right of the Corporation to indemnify or reimburse such person in any proper case even though not specifically herein provided for. The Corporation, its directors, officers, employees and agents, shall be fully protected in taking any action or making any payment under this Article X, or in refusing so to do, in reliance upon the advice of counsel."

N. J. S. A. 14:3-17) moved the court below for an order requiring the plaintiff and intervener to give security in the amount of $125,000. The statutes are set out in the footnote.[2] The court below denied the motion on the ground that R. S. 14:3-15 is remedial in intent and in effect and that therefore the statute's provisions are not binding on a district court of the United States in a suit based on diversity

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[2] N. J. R. S. Cum. Supp. 14:3-15, N. J. S. A. 14:3-15, provides: "In any action instituted or maintained in the right of any domestic or foreign corporation by the holder or holders of shares, or of voting trust certificates representing shares, of such corporation having a total par value or stated capital value of less than five per centum (5%) of the aggregate par value or stated capital value of all the outstanding shares of such corporation's stock of every class, exclusive of shares held in the corporation's treasury, unless the shares or voting trust certificates held by such holder or holders have a market value in excess of fifty thousand dollars ($50,000.00), *the corporation in whose right such action is brought shall be entitled, at any stage of the proceeding before final judgment, to require the complainant or complainants to give security for the reasonable expenses, including counsel fees, which may be incurred by it in connection with such action and by the other parties defendant in connection therewith for which it may become subject pursuant to law, its certificate of incorporation, its by-laws or under equitable principles, to which the corporation shall have recourse in such amount as the court having jurisdiction shall determine upon the termination of such action.* The amount of such security may thereafter, from time to time, be increased or decreased in the discretion of the court having jurisdiction of such action upon showing that the security provided has or may become inadequate or is excessive."

N. J. R. S. Cum. Supp. 14:3-17, N. J. S. A. 14:3-17, provides: "This act shall take effect immediately and shall apply to all such actions, suits or proceedings now pending in which no final judgment has been entered, and to all future actions, suits and proceedings."

For the sake of brevity throughout this text of the opinion in referring to these two statutes we shall omit the references "N. J." and "Cum. Supp."

Emphasis added in this note and throughout the opinion.

as they would be if the Act gave a substantive right. See 7 F. R. D. 352. Beneficial has appealed. As an alternative, in the event the order is found not to be appealable at this stage of the proceeding, it has also petitioned this court at No. 9558 for a writ of certiorari or for a writ of mandamus, to the end that an order be entered by this court directing the court below to give effect to the New Jersey statute and require the plaintiff and the intervener to give security.

As to the Appealability of the Order Complained Of

Preliminarily, we must determine whether the order of the court below is appealable. Our appellate jurisdic-[fol. 43] tion of course is purely statutory. United States v. Horns, 3 Cir., 147 F. 2d 57. Section 128 of the Judicial Code, 28 U. S. C. A. § 225, provides for the appeal of final decisions. But, as was pointed out by Judge Magruder in Rubert Hermanos, Inc. v. People of Puerto Rico, 1 Cir., 118 F. 2d 752, 757, "A 'final decision' is not necessarily the ultimate judgment or decree completely closing up a proceeding. In the course of a proceeding there may be one or more final decisions on particular phases of the litigation, reserving other matters for future determination. See Knox National Farm Loan Ass'n v. Phillips, 300 U. S. 194, 197, 198 . . . ; Trustees v. Greenough, 105 U. S. 527 . . . ; Gay v. Hudson River Electric Power Co., 2 Cir., 184 F. 689; Dant & Russell v. J. D. Halstead Lumber Co., 9 Cir., 103 F. 2d 306. The words 'final decisions,' like the equivalent 'final judgments and decrees' in former acts regulating appellate jurisdiction, have not been understood in a strict and technical sense, but have been given a liberal and reasonable construction. Forgay v. Conrad, 6 How. 201, 203 . . . ; City of Eau Claire v. Payson, 7 Cir., 107 F. 552, 557."

In Cobbledick v. United States, 309 U. S. 323, 328, the opinion by Mr. Justice Frankfurter contains an illuminating discussion of the subject of finality and refers to the "mischief" which may come to pass when an erroneous order, though made early in a proceeding but of final effect in determining a party's right, is considered not appealable. While the Cobbledick opinion deals with a criminal appeal the principle set out therein is equally applicable to civil causes. In United States v. River Rouge Co., 269 U. S. 411, 414, it was said, "While the general rule requires that a judgment of a federal court shall be final and complete be-

fore it may be reviewed on a writ of error or appeal, it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the [fol. 44] general litigation." See also Janssen v. Belding-Corticelli, 3 Cir., 84 F. 2d 577; Stokes v. Williams, 3 Cir., 226 F. 148, cert. den. 241 U. S. 681; Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Philadelphia Co., 3 Cir., 266 F. 1. See also 10 Cyc. Fed. Procedure, 2nd Edition, 1943, p. 231.

The nature of the instant controversy and that of the main action in the case at bar leaves no doubt that Beneficial's application for security is collateral. The corporation seeks to enforce its own right under the statute against the plaintiff and intervener. Its interest in respect to security is adversary to that of the plaintiff and of the intervener. The individual defendants, real parties in interest in the main action, are not involved directly in the controversy as to the giving of security and cannot be affected legally by its determination. In at least two decisions the Supreme Court has come very close to the position asserted by Beneficial. In Trustees v. Greenough, 105 U. S. 527, 531, the Court held that an order awarding expenses and counsel fees to the plaintiff in a representative bondholder's suit was appealable. In the more recent case of Sprague v. Ticonic Bank, 307 U. S. 161, the Court took the position that an issue respecting the allowance of counsel fees and expenses was separate and distinct from the main litigation, outside the original decree of the trial court and the scope of the appellate mandates, and, treating an order denying counsel fees and expenses as appealable, passed upon the merit of the application.

We are not unmindful of the provisions of R. S. 14:3-15 which state that the corporation "at any stage of the proceeding" may make application for security but the court below deemed the statute inapplicable in the instant case at any time. It follows therefore that without the right to sustain an appeal Beneficial could never gain the security to which it is entitled if the statute is applicable for a writ of mandamus could issue from this court only in aid of its appellate jurisdiction. See Section 262 of the Judicial Code, [fol. 45] 28 U. S. C. A. § 377, and United States *ex rel.* Potts v. Rabb, 3 Cir., 147 F. 2d 225, cert. den. 324 U. S. 870. If

the order of the court below is not appealable we would not have the right to issue the writ since insofar as the instant litigation is concerned this court would have no appellate jurisdiction to protect.

We hold the order to be appealable.

The Right Created by the New Jersey Statute and the Conflict of Laws

Beneficial is a Delaware corporation. The law of Delaware is, of course, determinative of the liability of the officers and directors to the corporation and that of the corporation to its officers. Gallup v. Caldwell, 3 Cir., 120 F. 2d 90. On March 31, 1941, Article X of the By-Laws was adopted by the vote of Beneficial's stockholders which, as we have stated, provides for the indemnification by the corporation of directors and officers against any claim or liability to which any of them might become subject by reason of his office. Indemnification is restricted, however, to claims or demands not arising because of the director's or officer's negligence or wilful misconduct. See note 1 *supra*. Article X finds sanction in Section 2 (10) of the Delaware Corporation Law, Delaware Laws 1944, c. 125, Section 1, p. 442. The by-law was couched in the terms of the Delaware statute subsequently enacted.

The law of Delaware is important in the instant case only because it authorizes Beneficial to indemnify the defendants in the instant case if the plaintiff cannot maintain her cause of action. No substantial conflict-of-laws question appears under the circumstances for the obligation of indemnification created by Article X under the Delaware law would be enforceable against Beneficial in any State. The right of the officers and directors of Beneficial to indemnification under the by-law is analogous to a contract right. While a district court of the United States is compelled in diversity cases to follow the rule of law prevailing in the State in which the court sits, Klaxon Co. v. Stentor Co., [fol. 46] 313 U. S. 487, and Jackman v. Equitable Life Assurance Society, 3 Cir., 145 F. 2d 945, we entertain no doubt that a State court of New Jersey would enforce freely and fully any liability arising under the contract. R. S. 14:3-15 simply provides a means whereby the corporation may recoup any losses which it may have sustained by reason of the indemnification of its directors or officers.

The Legislature of New Jersey in enacting the statute intended to prevent losses to both domestic and foreign corporations and to their stockholders by unjustified[3] litigation. We think that it is enough to state now that we can perceive no dichotomy between the laws of New Jersey and Delaware which would permit the plaintiff or the intervener to escape the impact of R. S. 14:3-15, if it is otherwise applicable.

The Public Policy of the State of New Jersey as Embodied in R. S. 14:3-15

It is clear that R. S. 14:3-15 embodies an important public policy of the State of New Jersey and represents an exercise of the police power of that State. The Legislature of New Jersey by enacting the statute intended to prevent losses to both foreign and domestic corporations and their stockholders by "strike" suits. This view was expressed by Governor Walter E. Edge when he approved the Act.[4] He pointed out that the statute's purpose was "to deter the filing of irresponsible suits by persons who either have no legitimate cause of action or who institute such action more for the personal gain of a settlement out of court than in the interest of the corporation or its stockholders. These suits involving the highly complicated transactions of modern corporate business are very costly to defend, regardless of whether or not they may be justifiable. For this reason they have been the subject of great abuse and have been [fol. 47] used to harass corporate officers and directors with baseless litigation . . . It is a minimum protection for corporations and their officers and directors, against 'strike suits' . . ." A statement similar in tenor was attached to Assembly Bill No. 242, which became the Act under consideration, introduced by Assemblyman W. H. Jones in the House of Assembly on March 16, 1945. Governor Thomas E. Dewey of New York made a substantially similar statement with regard to the New York Act, now Section 61-b

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[3] We desire to make it plain that in using this adjective we do not refer to the suit at bar. We are speaking in general terms of the intent of the New Jersey Legislature.

[4] See "Governor's Press Releases of 1945," p. 317, retained in The State House at Trenton, or, Newark Evening News, Suburban Ed., April 12, 1945, p. 20, column 1.

of the General Corporation Law of New York. Governor Dewey said, ". . . many suits that were well based have been brought, not in the interest of the corporation or of its stockholders, but in order to obtain money for particular individuals who had no interest in the corporation or in its stockholders. Secret settlements—really payoffs for silence—have been the subjects of common suspicion." [5] The New York statute is almost identical with that of New Jersey. See as cited in note 15 *infra*.

The Application of R. S. 14:3-15 in the Case at Bar, So-Called "Retroactive" Provisions Aside

Without regard to the question whether the New Jersey statute creates a substantive right or is merely remedial we conclude that the statute is applicable in the case at bar, the so-called "retroactive" effect of R. S. 14:3-17 aside,[6] because it states an important public policy of the State of New Jersey. The way to our conclusion was pointed out by the Supreme Court in Sioux County v. National Surety Co., 276 U. S. 238, in 1928. The principle of the Sioux County case was strengthened by Erie R. Co. v. Tompkins, 304 U. S. 64, and by Griffin v. McCoach, 313 U. S. 498, as exemplified by Guaranty Trust Company v. York, 326 U. S. 99, culminating perhaps [7] in Angel v. Bullington, 330 U. S. 183. [fol. 48] In the Sioux County case the Supreme Court held that a Nebraska statute which provided that in actions on guarantees and specified insurance contracts an attorney's fee should be "taxed as part of the costs," was to be given effect in a federal court in a suit against a guarantor. The guarantee had been entered into after the Nebraska Act (Neb. Comp. Stat., 1922, § 7811) had been passed. The Supreme Court of Nebraska in Nye-Schneider-Fowler Co. v. Bridges, Hoye & Co., 98 Neb. 863, 155 N. W. 235, a suit on an insurance contract entered into apparently before the statute's enactment, designated the Nebraska Act as "remedial" or as a "costs" statute thereby avoiding the impact of the Contract Clause. At p. 867 (155 N. W. at pp.

[5] See New York Times, March 9, 1945.

[6] The alleged retroactive effect of the statute is dealt with at a later point in this opinion. See R. S. § 14:3-17, N. J. S. A. 14:3-17.

[7] We use this word because we think the end is not yet.

236-7) the Supreme Court of Nebraska stated: "If the question that we are considering was now presented for the first time, we would hesitate to say that this statute does not create and add to the contract a legal liability which would not exist under the contract prior to the enactment of this statute. The fact that the attorney's fee is to be taxed as costs in the case is not of itself decisive of the question." In the Sioux County case Mr. Justice Stone, after quoting the foregoing statement of the Nebraska Supreme Court, went on to say: "But the question before the Nebraska court in the cases cited was not that with which we are now concerned. Whether this liability for an attorney's fee, assumed by entering into an insurance contract after the enactment of the statute providing for the liability, may be enforced in the federal courts does not depend on any nice distinctions which may be taken between the right created and the remedy given. Disregarding mere matters of form it is clear that *it is the policy of the state* to allow plaintiffs to recover an attorney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts."

[fol. 49] In Erie R. Co. v. Tompkins, 304 U. S. 64, the Supreme Court laid down the fundamental principle, overruling the doctrine of Swift v. Tyson, 16 Pet. 1, and depreciating the rule of law which sanctioned different results in litigation if tried in a federal court as distinguished from a State tribunal; and concluded that, except where the Federal Constitution or Acts of Congress required otherwise, the law to be applied in any case is the law of the State. Mr. Justice Brandeis, *Id.* at p. 71, referred to the Rules of Decision Act, 28 U. S. C. A. § 725, as determining the question whether the Pennsylvania rule of law which imposed liability on the owner of premises only for wilful and wanton injury to a trespasser was applicable. There would be little profit in discussing in this opinion whether the Pennsylvania rule was one of substance or went only to the remedy but using the ancient tests we may conclude that the rule of law was probably "substantive" in its nature as that quoted term has been usually employed. We think it must be gathered from Erie R. Co. v. Tompkins that the Supreme Court required district courts of the United States to stand bound

upon the public policy of the individual States as declared by the decisions of the State courts. Erie R. Co. v. Tompkins declared a major doctrine of constitutional law.

In Griffin v. McCoach, 313 U. S. 498, after citing Klaxon Co. v. Stentor Mfg. Co., 313 U. S. 487, for the proposition that the rules of conflict of laws governing a federal court in diversity cases are those of the State in which the federal court sits, the Supreme Court held that the public policy of Texas as to the existence or non-existence of an insurable interest under a life insurance contract must be determined by the Texas decisions, the courts of the United States being compelled to effect the law of Texas in this respect. This decision stems clearly from Erie R. Co. v. Tompkins.

In Guaranty Trust Company v. York, 326 U. S. 99, the Supreme Court indicated that that doctrine of constitutional law, expressed in the Erie R. Co. case and in Griffin [fol. 50] v. McCoach, implicit in the Sioux County decision, required federal courts sitting in diversity cases to apply any statute of a State which might effect a substantial difference in the respective rights or statuses of the parties. In short, the Court ruled that the litigant who comes into a federal court should have the substantial rights which he would have in a State tribunal. There was qualification to this principle but it is not pertinent here.[8] It should be borne in mind that in the Guaranty Trust Company case the question before the Supreme Court was whether a statute of limitations of New York should operate to bar the plaintiff's suit. We venture to suggest that prior to this decision few members of the bar had doubted that a statute of limitations was procedural and not substantive. But the Supreme Court required the New York statute to be applied by a district court sitting in equity despite the fact that the jurisdiction of district courts of the United States so sitting traditionally had corresponded to that of the English Court of Chancery: Michoud v. Girod, 4 How. 503, 561. Mr. Justice Frankfurter said, *Id.* at p. 108: ". . . since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State, it cannot afford recovery if the right to recover is made un-

[8] See Guaranty Trust Co. v. York, 326 U. S. at p. 105, quoted by the court below in its opinion, 7 F. R. D. at p. 355.

available by the State nor can it substantially affect the enforcement of the right as given by the State. And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense. The question is whether such a statute concerns merely the manner and the means by which a right to recover, as recognized by the State, is enforced, or whether such statutory limitation is a matter of substance in the aspect that alone is relevant to our problem, namely, does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the [fol. 51] same claim by the same parties in a State court? It is therefore immaterial whether statutes of limitation are characterized either as 'substantive' or 'procedural' in State court opinions in any use of those terms unrelated to the specific issue before us. *Erie R. Co. v. Tompkins* was not an endeavor to formulate scientific legal terminology. It expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, *the intent of that decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.*" Any statute of limitations declares a public policy of a State to set a period after which suits may not be brought.

Angel v. Bullington, 330 U. S. 183, again makes plain the insistence of the Supreme Court that a federal court sitting in a diversity suit must enforce State law and State policy. In the Angel case a statute of North Carolina (30, Public Laws, 1933, Michie's Code, § 2593) precluded recovery of a deficiency judgment in North Carolina for unpaid notes secured by a mortgage. The Supreme Court of North Carolina, 220 N. C. 18, 20, 16 S. E. 2d 411, 412, had held that "The statute operates upon the adjective law of the state, which pertains to the practice and procedure, or legal machinery by which the substantive law is made effective, and not upon the substantive law itself. It is a limitation of the jurisdiction of the courts of this state." Bullington did not appeal the decision to the Supreme Court of the United States but brought a new action for a deficiency judgment in the District Court of the United States for the

Western District of North Carolina. He recovered judgment, the decision being affirmed, 150 F. 2d 679. The Supreme Court of the United States, reversing, stated that it was necessary for the federal courts in diversity cases to [fol. 52] give effect to the public policy of the States. Mr. Justice Frankfurter said at p. 191, "It is suggested that the North Carolina Supreme Court construed the North Carolina statute to close only the North Carolina State courts but not the federal court sitting in North Carolina. In the first place, the North Carolina Supreme Court said no such thing. It construed the statute expressive of State policy and spoke only of the jurisdiction of the State courts because it was concerned only with the State courts. Secondly, it is most incongruous to attribute to the legislature and judiciary of North Carolina the imposition of a restriction against all its citizens from suing for a deficiency judgment while impliedly authorizing citizens of other States to secure such deficiency judgments against North Carolinians. Thirdly, a North Carolina statute, upheld by the highest court of North Carolina, is of course expressive of North Carolina policy. *The essence of diversity jurisdiction is that a federal court enforces State law and State policy.* If North Carolina has authoritatively announced that deficiency judgments cannot be secured within its borders, it contradicts the presuppositions of diversity jurisdiction for a federal court in that State to give such a deficiency judgment. North Carolina would hardly allow defeat of a State-wide policy through occasional suits in a federal court. What is more important, diversity jurisdiction must follow State law and policy. A federal court in North Carolina, when invoked on grounds of diversity of citizenship, cannot give that which North Carolina has withheld. Availability of diversity jurisdiction which was put into the Constitution so as to prevent discrimination against outsiders is not to effect discrimination against the great body of local citizens."

Now it must be conceded in the case at bar that the right to security given to Beneficial by R. S. 14:3-15 is not a part of and is legally unconnected with the causes of action asserted by the plaintiff against the individual defendants for the benefit of the corporate defendant. It is as if a [fol. 53] little cause of action had been engrafted on the body of the main suit for the benefit of the corporation. There can be no doubt, however, that the New Jersey statute im-

poses a limitation on the right of the plaintiff to maintain her suit. R. S. 14:3-15 is a kind of legal hybrid, functioning both by way of limitation and creation. It is in some respects an extension of the New Jersey Chancery Act, R. S. 2:29-131, N. J. S. A. 2:29-131, which gives a right to the Court of Chancery of New Jersey to award counsel fees and costs as between party and party, but as was pointed out by Chief Judge Lehman in Shielcrawt v. Moffett, 294 N. Y. 180, 190, 61 N. E. 2d 435, 440, in construing Section 61-b of the General Corporation Law of New York,[9] upon which R. S. 14:3-15 was patterned, " . . . the statute [61-b] creates a remedy for a wrong for which previously there was no remedy, and it interferes with the antecedent right of small stockholders to maintain derivative actions in behalf of the corporation and gives to corporations rights which they had not previously enjoyed."[10]

But the exact nature of the right given to a corporation need not be determined on this aspect of the case for it is clear that it is a substantial one[11] and that it embodies the public policy of New Jersey. The question for our determination therefore is: Putting the so-called "retroactive" application of R. S. 14:3-15 aside, can the plaintiff by coming into the District Court of the United States for the District of New Jersey avoid a limitation upon her action which she would be subjected to had she filed suit in the Court of Chancery of New Jersey? In short, can she escape the limitation of the New Jersey statute by entering the

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[9] See Sections 61-b, 64 and 67 of the General Corporation Law of the State of New York, McKinney's Consolidated Laws of New York Ann., Book 22, 1948 Supp.

[10] We shall deal at somewhat greater length with the nature of the right given to Beneficial at that point of this opinion which discusses the so-called "retroactive" effect of the statute under R. S. 14:3-17, N. J. S. A. 14:3-17.

[11] Beneficial alleges that the costs and counsel fees for which it will be liable will amount to $125,000. Though this estimate may well be taken with salt we entertain no doubt that the amount involved will be large. It will be the duty of the court below on remand to determine the proper amount of the security to be given.

[fol. 54] federal court house rather than that of the State? We think the answer must be in the negative.[12]

If this be a limitation on the jurisdiction of the District Court of the United States for the District of New Jersey it is none the worse for so being. In Angel v. Bullington the Supreme Court by requiring the District Court of the United States for the Western District of North Carolina to give full effect to the North Carolina statute imposed a limitation upon the jurisdiction of that court and expressly declared, 330 U. S. at p. 192, "Cases like *Lupton's Sons Co.* v. *Automobile Club*, 225 U. S. 489, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with *Erie Railroad* v. *Tompkins*, 304 U. S. 64. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts."

In view of what has been said we deem it unnecessary to comment at length on Pusey & Jones Co. v. Hanssen, 261 U. S. 491, 497, relied on in the opinion of the court below. In that case, as is pointed out in note 3 to the opinion in Guaranty Trust Co. v. York, cited to the text at 326 U. S. p. 106, the Supreme Court had to decide whether a Delaware statute (Revised Code of Delaware, 1915, Section 3883) had created a new right appropriate for enforcement in accordance with traditional equity practice or whether the Act had given the Chancery Court of Delaware a new kind of remedy. The Supreme Court held that the Delaware statute was remedial and did not create a new interest in a simple contract creditor as distinguished from a secured creditor, applying for a receiver for an insolvent Delaware corporation. With words as cold and sharp as the point of a scalpel the late Chancellor Wolcott [fol. 55] cut the ligatures which bound the Hanssen case to

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[12] We are aware that our decision is contrary in substance to that of Aspinook Corporation v. Bright, 2 Cir. 165 F. 2d 294, and directly contrary to decisions such as Boyd v. Bell, D. C. S. D. N. Y., 64 F. Supp. 22, and the other authorities cited to the point in 165 F. 2d at p. 295. Cf. Donovan v. Queensboro Corporation, D. C. E. D. N. Y., 75 F. Supp. 131. While these decisions are entitled to great weight we cannot follow them.

the law of Delaware. See Mackenzie Oil Co. v. Omar Oil & Gas Co., 14 Del. Ch. 36, 45, 120 A. 852, 856. But despite the note referred to in Guaranty Trust Co. v. York we cannot say that the decision in the Hanssen case retains its full potency in the courts of the United States. If, as we have decided, we may not concern ourselves in the case at bar with the ancient diversities between adjective and substantive law, the Hanssen case must be by-passed. If it is to be overruled, it must be by the Supreme Court. The Hanssen case in view of the authorities previously cited may by 1948 have become a signpost on a one-way street leading ultimately to that legal border where substance and procedure will become in law, as in fact, one.

We can perceive no reason why the provisions of R. S. 14:3-15 should not be as fully operative in respect to a suit against a foreign corporation, such as Beneficial, as in a suit against a New Jersey corporation. It is the express policy of R.S. 14:3-15 to protect foreign as well as domestic corporations. The fact that Delaware has no statute corresponding to those of New Jersey and New York is immaterial.[13] The New Jersey statute finds its vitality in the District Court of New Jersey by reason of the Rules of Decision Act and the decisions of the Supreme Court in interpreting that Act from the Sioux County case to Angel v. Bullington.

The point set up in the able opinion of the court below, 7 F. R. D. at p. 356, that R. S. §§ 823, 824, 28 U. S. C. A. §§ 571, 572, prohibits the allowance of the expenses contemplated by the New Jersey statute (for which security is to be required) is fully answered by the Sioux County case, 276 U. S. at p. 244. In the cited case it was held that counsel fees under the Nebraska statute though allowed [fol. 56] and "taxed as part of the costs" were not costs in the ordinary sense and not taxable as costs under R. S. §§ 823, 824 in the federal court.

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[13] It should be pointed out again, as stated at an earlier point in this opinion, that Article X finds full support in Section 2(10) of the Delaware Corporation Law. If the plaintiff's suit is unsuccessful, Beneficial will be liable for the individual defendants' counsel fees and costs. It is clear that the public policy of New Jersey as embodied in R.S. 14:3-15 is in nowise inconsistent with that of Delaware as disclosed in Section 2(10) of the Delaware Corporation Law.

As to Constitutionality Generally, and as to the So-Called Retroactive Application of the New Jersey Statute

It cannot be seriously contended that R. S. 14:3-15 would be unconstitutional as applied to any suit commenced after the date of its approval. The substantial question raised on this appeal on this aspect of the case is, we think, answered fully and clearly by the decision of Chief Judge Loughran in Lapchak v. Baker,* — N. Y. —, 80 N. E. 2d 751, dealing with the constitutionality of Section 61-b of the General Corporation Law of New York. The contrary view is succinctly presented by Zlinkoff in his virile article entitled "The American Investor and the Constitutionality of Section 61-b of the New York General Corporation Law", 54 Yale L. J. pp. 352-392. The learned writer, relying on the Due Process Clause, asserts *Id.* at pp. 374 *et seq.* that the operation of Section 61-b ". . . will deprive a great majority of stockholders of the only available judicial remedy for the protection of their rights", by requiring security from them in an amount which they cannot produce. But R. S. 14:3-15 requires "security for the *reasonable* expenses, including counsel fees, which may be incurred" by the corporation and by other parties defendant. The statute also provides that the amount of the security required by the court may be increased or decreased from time to time as it may become "inadequate" or "excessive". It is clear, we think, that the last two adjectives quoted must be read in connection with the adjective "reasonable" italicized above. In other words the test is the amount of the expenses reasonably to be anticipated rather than the extent or capacity of the plaintiff's pocketbook. But the amount of the security to be required by the trial court is [fol. 57] not presently before us. No amount of security was set by the court below for the reason that it was of the opinion that the statute was inapplicable. Any question relating to the amount of the security is still *in nubibus* and we cannot pass upon it in the absence of an order based on appropriate findings by the court below. An analogy is presented by the extent of the review in the Lapchak case. See the last sentence of the seventh paragraph of the opinion of the Court of Appeals of New York.

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* Decided July 16, 1948.

In conclusion upon this point we point out that it is not the duty of a court to pass upon the wisdom of a public policy effected by a legislature. Much of the plaintiff's and intervener's argument as well as that of the Zlinkoff article is addressed to the wisdom of statutes such as that *sub judice*. It is pointed out by the latter that Section 61-b does not meet the worst feature of the groundless "strike" suit in that the statute does not prohibit secret settlements. This is true also of R. S. 14:3-15. But the Legislatures of the States are in a very real sense laboratories for legislation and early experiments are rarely perfect. We may inquire, as did the Supreme Court of the United States by Mr. Justice Roberts in Nebbia v. New York, 291 U. S. 502, 515, into "the occasion for the legislation and its history." We did this under the previous heading of this opinion. But we think that it cannot be asserted fairly that the provisions of R. S. 14:3-15 do not represent a reasonable effort by New Jersey to eradicate an evil deemed by its Legislature to be widespread. We may not hold the statute unconstitutional on the showing made by the plaintiff and intervener.

As to the so-called retroactive application of R. S. 14:3-15, R. S. 14:3-17 provides that the effective date of R. S. 14:3-15 should be immediately upon its approval, viz., on April 10, 1945, "and [that R. S. 14:3-15] shall apply to all such actions, suits or proceedings now pending in which no final judgment has been entered, and to all future actions, suits or proceedings." The suit at bar was filed on [fol. 58] August 9, 1943 and Beneficial's application for security under the Act was not filed until August 5, 1946. We agree with those portions of the opinion of the learned District Judge, 7 F. R. D. 355-7, which hold that the right given by R. S. 14:3-15 is largely remedial, though, as we have stated, the right is actually a hybrid. The view that a statute of the character of R. S. 14:3-15 is somewhat remedial in nature was expressed by the Court of Appeals of New York by Chief Judge Lehman in Shielcrawt v. Moffett, *supra*, though that Court did not pass upon the question of whether Section 61-b of the General Corporation Law of New York applied retroactively would be constitutional.[14] The plaintiff and the intervener contend that

[14] The New York Legislature omitted the formula embodied in R. S. 14:3-17 and quoted in the paragraph of the

the application of the New Jersey statute to the suit at bar would abridge the equity jurisdiction of the Court of Chancery in violation of Article VI, Section 1, of the New Jersey Constitution, citing Ex parte Hague, 104 N. J. Eq. 31, 144 A. 546, aff'd 104 N. J. Eq. 369, 145 A. 618, and other authorities including Eastwood Nealley Corp. v. International etc. Dist. 47, 124 N. J. Eq. 274, 1 A. 2d 477.

We cannot agree. The court below, quite properly, as we think, treated R. S. 14:3-15 as an extension in principle of the provisions of the New Jersey Chancery Act, in pertinent part embodied in R. S. 2:29-131, by which the Court of Chancery of New Jersey is empowered to award counsel fees and costs as between party and party. If we are correct in this conclusion it is clear that no provision of the Constitution of New Jersey will be violated by applying the provisions of the statute to the instant suit. The Courts of New Jersey, including the Court of Errors and Appeals, have held that statutes creating a right to counsel fees "as part of the taxable costs" may be applied to pending actions. See Igoe Bros. v. National Surety Co., 112 N. J. L. [fol. 59] 243, 169 A. 841; Robinson v. Jackson (Ct. Com. Pleas), 14 N. J. Misc. 866, 187 A. 918; and Murphy v. Brown & Co. (Sup. Ct.), 91 N. J. L. 412, 103 A. 28. True, these decisions are based upon the proposition that such statutes are remedial only but nonetheless the decisions cited are clear rulings to the effect that no provision of the New Jersey Constitution is violated. Interpretations of the New Jersey Constitution by the courts of New Jersey are binding on us on this point of the instant case. By analogy, we are forced to the conclusion that the courts of New Jersey would also hold that the application of the statute *sub judice*, even to suits pending at the time of its approval, would violate no provision of the Constitution of New Jersey.

In so stating we are aware that a right beyond that given by the pertinent section of the Chancery Act, R. S. 2:29-131, is awarded to corporations by R. S. 14:3-15. The pertinent provisions of the Chancery Act state that the Chancellor may make an allowance by way of counsel fee

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opinion to which this note is cited. The Court of Appeals of New York held that since the New York statute omitted that formula the Legislature did not intend that Section 61-b should be applied to a stockholder's derivative suit pending at the time of its approval.

"to the party obtaining the order or decree". Assuming that a decree in favor of the plaintiff against the individual defendants awarding a sum of money to Beneficial might be deemed to be a decree "obtained" by it, (and even to state such an assumption is in reality to refute it) Beneficial under R. S. 2:29-131 could obtain only its own counsel fees and expenses and could secure no indemnification whatsoever for sums expended by it to pay the counsel fees and expenses of the individual defendants. But the remedy or right conferred on corporations by R. S. 14:3-15 clearly proceeds along the same general lines of indemnification as those laid down by R. S. 2:29-131 of the Chancery Act. We are of the opinion that no clear-cut and effective distinction in principle between R. S. 14:3-15 and R. S. 2:29-131 is possible.[15]

[fol. 60] The plaintiff and intervener also contend that R. S. 14:3-15 violates the Contract Clause of the Federal Constitution. But the right of a stockholder to prosecute a derivative action is not a contractual right. We know of no Delaware decision which suggests even remotely that a stockholder's derivative suit is based upon breach of contract. The right of a stockholder of a Delaware corporation to maintain a derivative suit on behalf of the corporation is based upon a breach of fiduciary duty by the directors or officers of the corporation. The officers and directors of a Delaware corporation are trustees for its stockholders under Delaware law. Lofland v. Cahall, 13 Del. Ch. 384; 118 A. 1; Bodell v. General Gas & Electric Corp., 15 Del. Ch. 119, 132 A. 442. Cf. Irving Trust Co. v. Deutsch, 73

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[15] Compare Section 61-a of the General Corporation Law of New York with Section 61-b, and Section 61-b with R. S. 2:29-131 and R. S. 14:3-15. Section 61-a provides that in any action, suit or proceeding against one or more officers or directors of a corporation "brought by the corporation, or brought in its behalf . . . by one or more stockholders . . . the reasonable expenses, including attorneys fees, of any party plaintiff or party defendant incurred in connection with the successful prosecution or defense of such action, suit or proceeding shall be assessed upon the corporation."

The two sections of the General Corporation Law of New York and the two sections of the New Jersey law operate in a similar field.

F. 2d 121. The cases cited by the plaintiff and intervener as sustaining their position are inapposite.

We conclude also that the application of R. S. 14:3-15 to the suit at bar will not fall within the prohibition of the Fourteenth Amendment of the Constitution of the United States. The remedy selected by the New Jersey Legislature was reasonable in view of the evil which the legislature has sought to cure. The plaintiff is not deprived of her cause of action by the New Jersey statute and she may assert her remedy subject to a reasonable condition. The right to bring a stockholder's derivative suit is not a property right and as this court held in Overfield v. Pennroad Corporation, 146 F. 2d 889, 894, quoting 4 Pomeroy § 1095, the individual stockholder is permitted to sue "simply in order to set in motion the judicial machinery of the court." As was said by the Supreme Court in Klein v. Board of Supervisors, 282 U. S. 19, 24, ". . . it leads nowhere to call a corporation a fiction. . . . The corporation is a person and its ownership is a nonconductor that [Fol. 61] makes it impossible to attribute an interest in its property to its members." A stockholder's suit is a suit by the corporation conducted by the stockholder as its representative. Fletcher Cyclopedia Corporations (Perm. Ed. 1943, Rev. Vol. (§ 5939)). In Jones v. Union Guano Co., 264 U. S. 171, 181, the Supreme Court said, "The Fourteenth Amendment does not prevent a State from prescribing a reasonable and appropriate condition precedent to the bringing of a suit of a specified kind or class so long as the basis of distinction is real, and the condition imposed has reasonable relation to a legitimate object." While it is true that in the cited case the State statute (Section 7, c. 143, Laws of North Carolina of 1917) which prohibited a suit being brought for alleged defective fertilizer until after chemical analysis showing its ingredients had been made, was enacted prior to the time that the plaintiff commenced his suit, the principle stated is nonetheless applicable here. Although R. S. 14:3-15 and R. S. 14:3-17 did create a limitation on the right of the plaintiff to *maintain* the suit at bar it is a reasonable limitation when one considers the nature of the evil attempted to be cured. Moreover, the limitation imposed by the statutes does not run to the plaintiff's right to maintain her suit which remains legally unimpaired. On this aspect of the case as we have stated the New Jersey statutes are largely procedural and

remedial, rather than substantive. Last, the mere fact that a statute is retroactive does not render it unconstitutional. Blount v. Windley, 95 U. S. 173, 180; Western Union Telegraph Co. v. L. & N. R. R. Co., 258 U. S. 13; cf. United States *ex rel.* Rodriguez v. Weekly Publications, Inc., 2 Cir. 144 F. 2d 186.

We conclude that the application of R. S. 14:3-15 to the instant suit is constitutional.

As to the Application of the Act to the Suit at Bar

We should point out, though the question is not immediately before us, that the wording of R. S. 14:3-15 leaves no discretion in the court below to require security [fol. 62] of the plaintiff or the intervener. The only discretion conferred on the court by R. S. 14:3-15 is as to the *amount* of the security and of the subsequent reimbursement. The Act provides that the corporation "shall be entitled . . . to require the complainant . . . to give security . . ., to which the corporation shall have recourse in such *amount* as the court . . . shall determine . . ." This interpretation is in accord with that given to the New York statute, Section 61-b, which as has been observed is almost identical in terms with the New Jersey Act. See Isensee v. Long Island Motion Picture Co., 184 Misc. 625, 54 N. Y. S. 2d 556, and Shielcrawt v. Moffett, 294 N. Y. at p. 187, 61 N. E. 2d at 438.[16] The courts of New Jersey will find the interpretation of Section 61-b by the New York courts to be persuasive in construing R. S. 14:3-15. See in re Cook's Estate, 118 N. J. Eq. 288, 291, 179 A. 259, 260.[17]

[16] Judge Lehman said, ". . . if the defendants succeed in their defense, the corporation . . . will be subject to liability for expenses of substantial amount incurred not only by itself but also by the individual defendants; and the corporation will have no recourse to the defeated plaintiffs for indemnity or reimbursement unless it is entitled to require the plaintiffs to give security as provided in section 61-b."

[17] The Court of Errors and Appeals said, ". . . when it is clear . . . that the legislation is but the enactment in this state of the law of another state or country, the interpretation as given in the place from which it is taken will be presumed to be that intended by the Legislature of our own state in so adopting it."

The remaining points raised by the parties do not require discussion.

Our decision makes it unnecessary for this court to pass upon Beneficial's application for mandamus or certiorari. Consequently an order will be entered at No. 9558 dismissing the petition. An order will be entered at No. 9567 reversing the order of the court below and remanding the cause with the direction to proceed in accordance with this opinion.

A true Copy:
Teste:

——— ———, Clerk of the United States Court of Appeals for the Third Circuit.

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[fol. 63] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 9567.

HANNAH COHEN, Executrix of the Estate of SOL COHEN, Deceased, Plaintiff,

DAVID F. COHEN, Intervener,

v.

BENEFICIAL INDUSTRIAL LOAN CORPORATION, Appellant,

and

O. W. CASPERSEN, JOHN BUDD SMITH, ROY E. TUCKER, T. Felter, Jackson R. Collins, C. V. Smith, E. L. Kincaid, Albert G. Morhart, Raymond D. Shepard, Alfred G. Zimmerman, Fred C. Eibell, Richard K. Steinman, and Paul A. Seibold, Individually, Defendants

DECREE

Present: Biggs, Chief Judge, O'Connell and Kalodner, Circuit Judges.

And Now, to wit, this 22nd day of September, 1948,

It Is Ordered that the order of the court below denying security to Beneficial Industrial Loan Corporation, pursuant to the provisions of N.J.R.S. Cum. Supp. 14:3-15 and N.J.R.S. Cum. Supp. 14:3-17, be and the same hereby is

reversed and the cause is remanded with the direction to proceed in accordance with the opinion of this court, with costs.

For the Court, Biggs, Chief Judge.

Endorsements: Decree Reversing Order of District Court, etc. Received & Filed Sept. 22, 1948.

Ida O. Creskoff, Clerk.

[fol. 64] I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Beneficial Industrial Loan Corporation, and proceedings in this Court in the cases of Beneficial Industrial Loan Corporation, et al. vs. Hon. William F. Smith, a Judge of the United States District Court for the District of New Jersey, No. 9558; and Hannah Cohen, et al. vs. Beneficial Industrial Loan Corp., et al., No. 9567, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 11th day of October in the year of our Lord one thousand nine hundred and forty-eight, and of the Independence of the United States the one hundred and seventy-third.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal.)

[fol. 77] In United States Court of Appeals for the Third Circuit

No. 9558

Beneficial Industrial Loan Corporation, Petitioner,
and
Hannah Cohen, Executrix of the Estate of Sol Cohen, Deceased, and David F. Cohen, Interveners,

v.

Hon. William F. Smith, a Judge of the United States District Court for the District of New Jersey, Respondent

Decree—Filed September 22, 1948

Present: Biggs, Chief Judge; O'Connell and Kalodner, Circuit Judges.

And now, to wit, this 22nd day of September, 1948,

It is ordered that the petition filed herein by Beneficial Industrial Loan Corporation for a writ of certiorari or mandamus be and the same hereby is dismissed.

For the Court.

Biggs, Chief Judge.

[File endorsement omitted.]

[fol. 78] I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Petition of Beneficial Industrial Loan Corporation for a Writ of Certiorari or for a Writ of Mandamus and Motion for Rule to Show Cause, and proceedings in this court, in the case of Beneficial Industrial Loan Corporation, et al. vs. Honorable William F. Smith, a Judge of the United States District Court for the District of New Jersey, No. 9558, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 30th day of December in the year of our Lord one thousand nine hundred and forty-eight, and of the Independence of the United States the one hundred and seventy-third.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal.)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 512

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 15, 1949.

Harold H. Burton, Associate Justice of the Supreme Court of the United States.

Dated this 19th day of December, 1948.

[fol. 79] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 442

ORDER ALLOWING CERTIORARI—Filed February 28, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 80] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 512

ORDER ALLOWING CERTIORARI—Filed February 28, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.